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June 19

**REPORTS**  
**OF**  
**CASES ARGUED AND ADJUDGED**  
**IN THE**  
**Court of Appeals of Maryland.**

**WM. H. PERKINS, JR.,**

**STATE REPORTER.**

**VOLUME 127.**

**CONTINUING THE CASES OF THE OCTOBER TERM, 1915.**

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***For the State of Maryland***

**JUL 8 1916**

## NAMES OF THE JUDGES, ETC.

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DURING THE PERIOD COMPRISED IN THIS VOLUME.

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### THE COURT OF APPEALS.

HON. ANDREW HUNTER BOYD, Chief Judge.  
HON. JOHN R. PATTISON, Associate Judge.  
HON. ALBERT CONSTABLE, Associate Judge.  
HON. NICHOLAS CHARLES BURKE, Associate Judge.  
HON. WILLIAM H. THOMAS, Associate Judge.  
HON. HAMMOND UNER, Associate Judge.  
HON. JOHN PARRAN BRISCOE, Associate Judge.  
HON. HENRY STOCKBRIDGE, Associate Judge.

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### THE CIRCUIT COURTS.

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HON. ROBLEY D. JONES, Associate Judge.  
HON. HENRY L. D. STANFORD, Associate Judge.

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HON. GLENN H. WORTHINGTON, Associate Judge.

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HON. BENJAMIN HARRIS CAMALIER, Associate Judge.

HON. FILLMORE BEALL, Associate Judge.

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### EIGHTH JUDICIAL CIRCUIT—*Baltimore City.*

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HON. THOMAS IRELAND ELLIOTT, Associate Judge.

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HON. CARROLL T. BOND, Associate Judge.

HON. WALTER I. DAWKINS, Associate Judge.

HON. JAMES M. AMBLER, Associate Judge.

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### Attorney-General.

EDGAR ALLAN POE, ESQ.

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### Clerk of the Court of Appeals.

CALEB C. MAGRUDER, ESQ.

**CORRIGENDA.**

**On Page 206.** The last page of Syllabus on this page is misplaced, and should be taken to follow the second paragraph.

**On Page 342.** Read "appellant" for "appellee."

**On Pages 374 and 385.** It should have been stated that W. Carroll Hunter appeared, with W. Calvin Chesnut (with whom was C. Ross Mace on the brief), for the appellee.

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# MARYLAND REPORTS.

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Continuing the Cases of the October Term, 1915.

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HYLAND P. STEWART

vs.

BARBARA KREUZER, ET AL.,

AND

BARBARA KREUZER, ET AL.,

vs.

THOMAS KREUZER, ET AL.

*Sales in equity: ratification; parties; purchase with knowledge of claims against property; purchaser estopped from objecting; interest. Adverse possession: no bar to specific performance of contract of sale.*

A purchaser can not be heard to object to completing a contract for the sale of property, upon the mere ground that title depends on adversary possession. pp. 9-10

In proceedings for the ratification of a trustee's sale, it is not necessary that all persons be made parties who by any remote possibility might have some claim against the property. p. 10

The mere threat or possibility of a contest will not be sufficient to induce a court to refuse a specific performance of a contract of sale; to justify such refusal, the doubt must be a rational one, and one which would induce a prudent man to hesitate about the title. p. 11

At a trustee's sale the contract provided that the balance of the purchase money would become due upon a ratification of

the sale by the court; there was considerable delay before the sale was in fact ratified; but as the delay did not appear to have been caused solely by the purchaser, it was: *Held*, that he should be charged with interest only from the day of ratification, and not from the day of sale. p. 11

*Decided November 10th, 1915.*

Cross-appeals from Circuit Court No. 2 of Baltimore City.  
(AMBLER, J.)

The facts are stated in the opinion of the Court.

The causes were argued together before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Warren A. Stewart*, for Hyland P. Stewart.

*John M. Requart*, for Barbara Kreuzer, et al.

BURKE, J., delivered the opinion of the Court.

The appeals in this case were taken from two decrees of Circuit Court No. 2 of Baltimore City, passed on the second and nineteen days of December, 1914. The decree of December 2nd ratified and confirmed a contract of sale, hereinafter particularly mentioned, of the property known as No. 214 W. Saratoga Street in Baltimore City. This contract was entered into between Joseph C. Lautner, as agent for the owners, and Hyland P. Stewart, as purchaser. As the decision on Mr. Stewart's appeal must rest largely upon the provisions of the contract, in connection with the evidence in the record, the contract will be here inserted:

"This Agreement, Made this 26th day of September, nineteen hundred and thirteen, between Joseph C.

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## Opinion of the Court.

Lautner, the Agent for the owners, Barbara Kreuzer, life tenant, Thomas Kreuzer, Joseph Kreuzer, Dr. William G. Muench, guardian of Thomas, Ruth, Paul and Joseph Muench; of the first part, and Hyland P. Stewart, of the second part;

"Witnesseth, That the said party of the first part do hereby bargain and sell unto the said party of the second part, and the latter doth hereby purchase from the former the following described property, situate and lying in Baltimore City and known as No. 214 W. Saratoga street as now in possession and occupancy of said owners.

"At and for the price of (\$13,375.00) thirteen thousand three hundred and seventy-five dollars, of which \$375.00 have been paid prior to the signing hereof, and the balance is to be paid as follows:

"It being understood that this sale is made subject to the ratification of the Circuit Court. It being necessary that a case be filed in said Court between the owners of said property before said property can be sold. Immediately upon ratification of sale the entire balance of the purchase money to become due.

"And upon payment as above of the unpaid purchase money, a deed for the property shall be executed at the vendee's expense by the vendor, which shall convey the property by a good and merchantable title to the vendee.

"Taxes and water rent, but no sewerage charges, to be paid or allowed for by the vendor to date of transfer, nineteen hundred and commissions to broker, M. A. Catling, to be paid by purchaser. Present tenant has a lease from year to year expiring October 31st, 1913, at a rental of \$840 per annum, one month's notice sufficient to terminate tenancy, which notice owners will at once give."

The property which is the subject of the contract was in the possession of Christopher Kreuzer at the time of his death. He took possession of the property under a deed to

him from Hiram Woods and others, dated April 28, 1874. The possessory lines of the property are shown by the record, and embrace the identical property occupied and enjoyed by Mr. Kreuzer during his life, and comprehend the exact property "in the possession and occupancy" of the vendors at the date of the contract.

Mr. Kreuzer died in July, 1878, and by his last will and testament the property was devised to his wife for life, or as long as she might remain his widow, and upon her death or remarriage to his children and their descendants. His estate has been fully administered and all his debts have been paid.

Mr. Kreuzer left surviving him his widow, Barbara, who is now over 70 years of age and has never remarried, and who is one of the appellees on this record, and four children. Two of these children are now dead. One died intestate and unmarried, and the other left surviving her four children who are now minors. The record shows that all persons in being who have any interest in the property under the will of Christopher Kreuzer, or by reason of intermarriage with any one of his children are parties to this cause.

On the 2nd of October, 1913, the bill in this case was filed under section 228, Article 16, of the Code for the sale of the property. It charged that Christopher Kreuzer and Barbara, his wife, as life tenant, have enjoyed the exclusive, adverse and absolute possession of the land, which is described in the bill and which was contracted to be sold, for a continuous and uninterrupted period of more than 39 years, and that the land has been enclosed for that period. It then set forth facts showing that it would be advantageous to all parties concerned that the property be sold and the proceeds be invested in some safe security so as to inure in like manner to the benefit of those interested therein under the will of Christopher Kreuzer. It then referred to the contract of sale, which we have transcribed, and charged that the sale was a most advantageous one and that the price for which

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the property was contracted to be sold is the best that could ever be obtained for it. The specific prayers of the bill are:

"1. That a decree may be passed for the sale of said property.

"2. That the contract mentioned in this Bill be ratified and confirmed by this Court and a trustee or trustees be appointed to convey the interest of all parties to this cause, in and to the property herein described, to the purchaser, Hyland P. Stewart, upon the payment of the purchase price, viz, \$13,375.00, and that the proceeds of said sale so made, be invested under the direction of this Court in some safe and profitable investment or security so as to inure in like manner to the use and benefit of the same parties who would be entitled to said property under the terms, conditions and provisions of the last will and testament of Christopher Kreuzer, deceased."

The defendants' answer, filed October 7, 1913, admitted the facts alleged in the bill, and consented to the sale as prayed, and on October 8, 1913, the general replication was filed. Nothing further appears to have been done until the 23rd of March, 1914, a period of more than five months, and on that day Mr. Stewart, as purchaser, filed a petition in the case in which it was alleged, *first*, that one of the objects of the suit was to establish by adversary possession the right and title in the plaintiffs to a strip of land about four feet. one and one-half inches of irregular dimensions on the west side of the property; that this strip of land was in conflict with the lines of the adjoining property on the west owned by Morrow Brothers, who had mortgaged the same in 1905 to the Fidelity Trust Company, and that the mortgage was still outstanding and unreleased, and that neither the Morrow Brothers nor the mortgagee had been made parties to the proceedings; *secondly*, "that sometime in the year 1906 said Morrow Brothers built a large warehouse on their property and established a party wall on their easternmost line with the property in question in this suit, but said party wall was

only established to the height of the plaintiffs' several walls adjoining, which are much lower than the walls of the said Morrow Brothers' new building, but said new wall was carried up much higher upon the same foundation lines as the said party wall of the Morrow Brothers' property, and about twenty windows have been opened therein overlooking the roofs and property mentioned in these proceedings, which was a trespass upon the rights of the plaintiffs as to the use of the above portion of said wall on the land of the plaintiffs; and an ejectment by the plaintiffs against Morrow Brothers might be necessary to settle the rights of the parties in the proper use of said wall above the roofs of the plaintiffs, whereby should the plaintiffs, or any purchaser from them desire to build up this property, it would be necessary to close up said windows, and also to build an entire new wall adjoining the said party wall to carry said upper wall as the plaintiffs in the absence of an agreement to the contrary may have no right to use said party wall above the present roofs of their property, and which would be a great depreciation to the property of the plaintiffs, or of any purchaser from them, or involve them in a law suit."

The petition further charged that the petitioner had had a verbal understanding and arrangement as to the settlement of the disputed lines and as to the use of the party wall above the vendors' property, but that the arrangement had not been reduced to writing; that neither the mortgagee nor the wives of the Morrow Brothers were parties to this arrangement.

Because of the facts stated it was alleged that the title to the property contracted to be sold was seriously affected, and that the petitioner objected to accepting such title as the vendors were able to give.

Upon this petition the Court passed an order making Mr. Stewart a party defendant, and requiring him to answer the bill, and further ordered that the Morrow Brothers and the Fidelity Trust Company, mortgagee, show cause why they

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should not be made parties and required to answer the bill. The answer of Mr. Stewart, filed April 3, 1914, admitted the contract set up in the bill and alleged that the vendors were unable to convey a good and merchantable title to the property, and for that reason the sale should not be ratified by the Court. The Morrow Brothers and the Fidelity Trust Company filed answers to the petition in which they showed cause why they should not be made parties. They were not made parties to the cause, and no further action with respect to them was taken. These answers were filed April 6th, 1914, and the papers were referred to an examiner to take testimony, and the first testimony was taken April 29, 1914. Great delay is shown in taking the evidence, and the depositions were not filed in Court until October 21, 1914, a period of more than six months after the first meeting before the examiner.

The decree of December 2, 1914, as heretofore stated, ratified and confirmed the contract, and appointed Joseph C. Lautner, trustee, to convey the property to the purchaser upon the payment by him of the balance of the purchase money, to wit, \$13,000. It was also decreed that Mr. Stewart should pay interest on said balance from the date of the decree, and assume all taxes and water rent from that date. It further provided that the costs of the proceeding be paid out of the estate, except the costs arising on the petition and answer of the purchaser and the testimony taken in connection therewith, which latter costs Mr. Stewart was adjudged to pay. This decree was modified by decree of December 19, 1914, in respect to the costs so as to make the costs of the certified copies of deeds filed by Hyland P. Stewart with the examiner payable out of the estate. Both parties have appealed—Mr. Stewart from both decrees, and the appellees from that part of the decree of December 2, 1914, which deals with the allowance of interest.

The record shows that on September 26, 1913—the day on which the contract was executed—Mr. Stewart wrote Mr. Lautner, the agent for the vendors, as follows:

"Dear Sir—In signing the contract with you this day, for the sale of property 214 West Saratoga street, I am informed of the contract made between Barbara Kreuzer, the life tenant, owner of said property, and Morrow Brothers, affecting the wall on the west of said property, and agree that I will make no point of this contract *in the sale* of the property to me. It being, however, understood that I am not bound by the contents of this contract so far as it affects any rights I might acquire from you as agent for the remaindermen in fee, in said wall, *but I especially agree not to object to your or their title or the title to be effected by the sale in the Circuit Court, because of the existence of such contract*, it being understood that the remaindermen in fee are entirely in ignorance of said contract about the wall and never ratified or knew of said contract.

"I further understand that the paper title to your property shows a front on Saratoga street of fifteen feet nine inches, but that you have in actual possession and have so held for over thirty years nineteen feet more or less to the present centre of the partition wall on the west. *If this possession has been continuous and uninterrupted for over thirty years I agree not to dispute the title on this account.*

"Yours very truly,

"Hyland P. Stewart."

The uncontradicted evidence in the record shows that Barbara Kreuzer, the life tenant, has been in the continuous, uninterrupted and adverse possession of the property sold, for more than thirty years; that Christopher Kreuzer took possession of the identical property in 1874 and remained in the exclusive and undisturbed possession thereof until his death in 1878, and that since then it has been in the possession and occupancy of his widow and children, and the devisees under his will. As to the very small strip of ground not included within the description contained in the deed of

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Opinion of the Court.

1874 from Hiram Woods et al. to Christopher Kreuzer it would be difficult to find more complete and satisfactory evidence than that contained in this record of title by adversary possession.

Mr. Lautner, who was well acquainted with the property and who had lived in the house and whose testimony is uncontradicted, was shown the deed of 1874 and testified: "The description of this deed calls for a front of fifteen feet and nine inches and a depth of one hundred and five feet. The lot is larger, however, having a front of about nineteen feet five inches with irregular lines following party walls to the full depth of one hundred feet. The property is in fee simple. \* \* \* I know this deed called for fifteen feet nine inches with a depth of one hundred and five feet, but the lot which he went into possession of in 1874 when purchased was exactly as it is today as enclosed by the walls and fences and is of irregular shape. \* \* \* He went into the possession of the same in 1874, on receipt of his deed, and up to his death lived in the house which occupied practically the whole lot as shown on the plat. After his death, his widow lived there up to some years ago, and she has rented it ever since, and collected the rent for the same, and the lines have always been the same for the whole time."

Asked what had been the character of this possession for the past thirty-nine years to his knowledge the witness said: "To my knowledge, it has been adverse, absolute and exclusive to all the world without any recognition of any right or claims of any persons whatever, and has been enclosed as is now by the occupancy of the house on the entire lot with the exception of a small yard on the east side, which is and always has been enclosed by a fence as shown on the survey." The testimony contained in the record fully gratifies the requirements of law as to adversary title to the few feet of ground involved in this controversy, and when such possession is shown the appellant cannot object to the sale upon the mere ground that the title to this small strip rests upon adversary possession, and in this case the purchaser ex-

pressly agreed not to dispute the title on that ground. The record we think discloses no defect of title.

As to the agreement of February 8, 1906, and referred to in the letter of Mr. Stewart, between Barbara Kreuzer, the life tenant, and the Morrow Brothers, relating to the construction of a new wall on the west side of the property, it is sufficient to say that the purchaser was aware of this agreement at the time the contract of purchase was made, and that he agreed, as shown by his letter of September 26, 1913, not to object to the title upon that ground.

In *Stewart v. Devries*, 81 Md. 525, the purchaser excepted to the ratification of a trustee's sale and relied upon an alleged defect, of which he had knowledge at the time he made his bid, in the title of the property. Speaking of this objection, the Court said: "As the appellant had ample notice of what the trustee was selling and as he purchased the property with full knowledge of the defect alleged in the title, it cannot be said that he was in any way misled by the trustee, or that any injustice will be done in requiring him to take the property in the condition he knew it to be in when he made his bid." See also *O'Sullivan v. Buckner*, 107 Md. 33.

The test of jurisdiction in the Court is to be found in the determination of the question whether a demurrer would lie to the bill. Tested by this principle the bill is free from objection. It was insisted that the bill is defective because of the omission of necessary parties; that the record shows that the paper title to the small strip of land in question is outstanding in the heirs of Daniel Chase, who owned the property about 1870, and that because they, the Morrow Brothers, and the Fidelity Trust Company, mortgagee, are not made parties, a good and merchantable title cannot be conveyed, and for this reason the sale should not be ratified. We do not agree to this contention. The law does not require an owner to make persons parties who by some remote possibility might have claims against the property, and in this way discredit his own title. If the proof shows the title to be free

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Opinion of the Court.

from reasonable doubt this is sufficient. The cases are numerous in this Court in which parties have been required to take property the title to which rested in adversary possession and in which possible claimants were not parties to the cause. We think it clearly established by the case of *Herbold v. Montebello Association*, 113 Md. 156, that such possession as is shown in this case is sufficient to establish a legal and marketable title to the property purchased. Judge SCHMUCKER said in that case, that: "It has frequently been held by this Court that in cases like the present, which are in *personam* and not in *rem*, the Court does not undertake to pronounce with certainty that the title is either good or bad, but whether it is free from reasonable doubt. A mere threat or possibility of a contest will not be sufficient to induce the Court to refuse to grant specific performance. The doubt must be a rational one and such as would induce a prudent man to hesitate about taking the title. *Gill v. Wells*, 59 Md. 492; *Herzberg v. Warfield*, 76 Md. 449; *Bay v. Posner*, 78 Md. 42; *Chew v. Tome*, 93 Md. 244; *Erdman v. Corse*, 87 Md. 506; *Rother v. Sharp St. Station*, 85 Md. 528.

As to the vendors' appeal from that portion of the decree relating to the allowance of interest. The Court, it appears, was controlled by the terms of the contract, which provided that the balance of purchase money should not become due until the ratification of the sale. While, as we have said, there appears to have been unnecessary delay in the conduct of the case and in bringing it to final hearing, this delay is not shown to be attributable solely to the purchaser. We are of opinion that the allowance of interest and the disposition of costs made by the decrees were proper, and finding no error in the conclusion reached by the Court below, the decrees will be affirmed.

*Decrees affirmed, the appellant, Hyland P.  
Stewart, to pay the costs in this Court.*

W., B. & A. R. R. CO., ETC.,

vs.

WILLIAM H. MOSS.

*Contracts: too vague to be enforced. Employment: contract for indefinite time; at will merely.*

In order to constitute a verbal or written agreement, the parties must express themselves in such terms that it can be ascertained, to a reasonable degree of certainty, what they mean.

p. 20

If the agreement is so vague and indefinite that it is not possible to collect from it the full intention of the parties, it is void.

p. 20

Neither court nor jury can make an agreement for the parties.

p. 20

No action will lie for the breach of a contract of employment unless there is a definite fixed time for the continuance of the contract; otherwise the hiring would be merely at will, to be terminable at pleasure.

p. 21

*Decided December 4th, 1915.*

Appeal from the Circuit Court for Howard County (FORSYTHE, J.), to which Court the cause had been removed from the Circuit Court for Anne Arundel County.

The facts are stated in the opinion of the Court.

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Opinion of the Court.

The cause was argued before **BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.**

*George Weems Williams* and *Edward M. Hammond* (with whom was *L. Vernon Miller* on the brief), for the appellants.

*Nicholas H. Green*, for the appellee.

**CONSTABLE, J.**, delivered the opinion of the Court.

In this case the appellee brought suit against three public service corporations, the Washington, Baltimore and Annapolis Electric Railroad Company, the Annapolis Public Utilities Company and the Annapolis Gas and Electric Light Company, for breach of an alleged verbal contract and declared on said contract. Before the conclusion of the trial the declaration was amended by striking out the Annapolis Gas and Electric Light Company as a defendant, and a verdict was found by the trial jury in favor of the appellee and against the two defendants, and from the judgment accordingly entered this appeal was taken.

The declaration, which contains but one count, avers that the appellee on the 1st day of February, 1913, was and had been, for a number of years prior thereto, engaged in a general retail grocery business in Annapolis, with a store located at 112 College avenue, which yielded an income sufficient for the support of himself and family, and in addition was an agent of the Washington, Baltimore and Annapolis Electric Railroad Company yielding a salary and other privileges; and occupied as a dwelling the property adjoining his said store, in which he conducted a successful boarding house yielding a good return; that while he was engaged in business as aforesaid, the defendant, the Washington, Baltimore and Annapolis Electric Railroad Company and the

Annapolis Public Utilities Company purchased the Annapolis Gas and Electric Light Company and desiring a more central location for a sub-station for the defendant, the W., B. & A. R. R. Co., selected the site of the plaintiff's place of business, and his dwelling as a desirable position; "and thereupon the defendants agreed and contracted with the plaintiff that upon his securing an option for the purchase of the property, so as aforesaid occupied by him, or a lease of the same, a surrender of his tenancy thereof and the closing out of his business conducted therein and thereon, to give him employment with the defendants, and in the remodeling and reconstruction of the property to provide a store for the said plaintiff, and allow him the privilege of conducting therein a lunch room and a store for the sale of such articles as are usually sold in places of like character, including tobacco, cigars, candy and ice cream; and the occupancy of the adjoining dwelling"; that acting upon the good faith of said agreement and contract the plaintiff carried out in every particular his part of the contract, but that the defendants, disregarding the said agreement failed and refused and still fail and refuse to give the plaintiff employment, and refuse to provide a store and lunch room for him and to allow him the privilege of sale on the premises as aforesaid.

The proof offered in support of the issues joined upon the filing of the general issue pleas was substantially as follows: The plaintiff conducted a store at the corner of College avenue and Bladen street in Annapolis, and resided in the house adjoining the store; that he sold tickets for the defendant, the W., B. & A. R. R. Co., for a monthly salary of five dollars and the privilege of a pass on the defendant company's road, and, in addition to these occupations, conducted a boarding house in his dwelling. The corner on which his business was located, was directly across the street from property which was owned by the Annapolis Short Line Railroad and the houses and buildings on which were about to be torn down so as to make a small park leading from College avenue to the station of the Annapolis Short Line R. R.

Md.]

## Opinion of the Court.

The Short Line is the rival transportation line of the appellant, the W., B. & A. R. R. The property occupied by the appellee was owned by his wife's aunt and had been occupied by him since 1899. It happened that Mr. Robert Moss, the counsel of the appellants, was also the brother of the appellee. The appellee went to his brother and sought to have him interest the officials of the W., B. & A. R. R. Co. in the advantages to be gained by it in securing the property occupied by him and converting it into a regular station and waiting room.

Mr. Robert Moss testified that, bearing in mind the request of his brother, he took up the proposition with Mr. Bishop, the president of the appellant companies, and other officials, upon their next visit to Annapolis. "I told him, Mr. Bishop, about the property; and told him that my brother had the property, but that he would give it up under certain conditions, and I suggested that we go down and look at the property." He and Mr. Bishop went down and stood across the street from the property. Mr. Bishop wished to know what the property rented for and asked witness to find out. The witness went across and found out from his brother and continued: "I came back and told him; told him my brother would want to occupy the house, would want a place to sell sandwiches and have a little store such as was usual in places of this kind, that he also wanted a place of some kind with them, taking care of the building and selling tickets. Mr. Bishop said it seemed all right to him, but it did not appear to me that he had made up his mind to it as yet." Later in the same day the officials went to Mr. Moss' office and "I talked over with them the purchase of the property and told them that my brother (appellee) was the best one to see about this for them. They told me to send for my brother; and I went for my brother and got him there."

The appellee testified that he went to the office of Robert Moss and met the officials and was sent to Baltimore to try to purchase the property; that his aunt would not sell

the property, but on his second visit, she said she would consider a long term lease; that after several visits a lease for ten years, with the privilege of renewal for ten years, was entered into between his aunt and Robert Moss, and subsequently assigned by Robert Moss to the railroad company; that the entire negotiations for the lease were carried through by the appellee, and for which he has not received any compensation. After the execution of the lease Bishop, the president; Craig, the treasurer, and Doyle, the general manager of the appellant companies, went over and through the properties, and Bishop at that time asked him, "Mr. Moss, do you want a lunch room in here? Do you think it will pay in here satisfactorily?" That witness then produced a sketch or plan for the reconstruction, that he had made, and on the departure of the officials they took the drawing, and it proved the original idea from which the building was built. That on April 21st, 1913, the master mechanic of the railroad company came to his store and told him they were ready to proceed with the work; thereupon the appellee moved, what little merchandise he had left, into the dwelling house and turned the store building over to them; and on the same day they commenced to tear down the building and erected upon the store lot the present two-story building, now used as a station. He further testified that in the reconstruction they were not making any place for him, and he wrote the following letter to Doyle, to which he received no reply:

"Annapolis, Md., May 21st, 1913.

"Dear Sir:—

"I now make formal demand on you to carry out the contract entered into between the President and General Manager of the W. B. and A. Electric Railroad and the Annapolis Gas and Electric Light Company, parties of the first part, and myself, William H. Moss, party of the second part, to wit: That in consideration of the party of the second part securing a lease on the property corner College Avenue and Bla-

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## Opinion of the Court.

den Street and closing out his general merchandise business and giving them possession of the property, that the parties of the first part would give the party of the second part privileges of said place, when completed, to sell such articles of merchandise as are usually sold in stations, and employment with said parties of the first part at a fair salary. Said contract to date from April 1st, 1913."

Witness further testified that after he knew no place had been provided for a lunch room for him Doyle offered him a position as meter reader at a salary of fifty dollars a month, but that witness had refused it, for he thought if he was not to have a lunch room he should have a position paying one hundred dollars a month. That he moved out of the dwelling house July 1st, 1913.

Mr. Robert Moss testified further that sometime after the execution of the lease he met Mr. Bishop in Annapolis, and I told him they were not satisfying my brother. "I said, I told him, as I understood it, my brother was to occupy the house, that he wanted an eating room there or a store room, a small one there, and he wants to work with you. My idea about that is that he could be of service to you, and so earn the money that you would get for rent for these two places. If you can give him something like that or equal to that, he can make a living and be of service to you, and that he was a sober and well-behaved fellow. Mr. Bishop said: 'All right, I want to satisfy you.' These were the last words Mr. Bishop said to me." After the appellee had called his attention to the fact that in the reconstruction no place was being provided, the witness wrote under date of May 28th, 1913, to Mr. Bishop:

"Dear Sir:— .

"I came to Baltimore today to see you, but have been unable to do so and have to return to Annapolis for a meeting at half-past four. I had a talk with my brother and he would like to rent the house at \$25.00

per month, have a door cut from the new building into one of the rooms of the dwelling so that he could use that room for the purpose of furnishing lunches, cigars, etc., in this room of the dwelling he now occupies.

"He would also take charge of the building and sell tickets from such time in the afternoon as the other men left, until twelve o'clock at night, and then in the morning from the early car until the day men arrive. During the day he would solicit business for the company, and, of course, would understand that if he did not make a success of it, you could not pay him as much as if he did make a success of it. He thinks he ought to have \$65.00 per month, \$25.00 of which he would pay back to the company for rent each month.

\* \* \*

"I was urgent to see you today because if the door is to be cut, Mr. Doyle ought to be told about it so it could be done before the building is completed. My brother would designate the place where the door is to be cut."

No reply was made to this letter.

We have so fully set forth the evidence produced on behalf of the appellee relating to the alleged contract, for the reason that the appellants by their fifth prayer asked the Court to instruct the jury that inasmuch as the alleged contract mentioned in the evidence was too indefinite and vague to entitle the plaintiff to recover against the defendants, or either of them, that therefore their verdict should be for the appellants. Of course, we have not set forth nor considered any of the testimony of the appellants unfavorable to the position of the appellee for it is not necessary to even cite authorities to sustain the proposition that in considering a prayer to withdraw a case from the consideration of the jury, "the Court must assume the truth of all the evidence produced before the jury, tending to sustain the claim, or defense as the case may be, and all inferences of fact fairly deducible

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## Opinion of the Court.

from it as on demurrer to the evidence; and this though such evidence be contradicted, in every particular by the opposing evidence in the cause." *Jones v. Jones*, 45 Md. 154.

So we have seen from the testimony the negotiations were principally carried on by Robert Moss with the officials of the appellants and there cannot be said to be any lack of definiteness, either from his or the testimony of the appellee, as what the appellee was to do in the performance of his part, although there may be a difference, at times, as to which one of the appellants or how many the alleged contract was being made with. We will assume, however, for the present point, that the agreement was entered into with both the appellants. However when we come to consider what the appellants were to do we find the same witnesses at one time claiming more and at another time claiming less was to be done by the appellants. For instance, the appellee in his letter to Doyle, makes no claim for the right to occupy the dwelling while in other parts of his testimony this claim is made. But considering in the most favorable aspect to the appellee, the appellants were (1) to allow the appellee to occupy the dwelling, (2) in the remodeling of the property, to provide a store for him and allow him the privilege of conducting a lunch room and store therein, and (3) to give him employment.

Nowhere was a word of testimony produced showing when the tenancy was to begin, when end, or how long was it to continue, nor what rent was to be paid. As far as the rent is concerned, the witnesses admitted the occupancy was not to be free, but they expected the amount to be taken into consideration in fixing the salary for employment, or in other words to be deducted from the amount otherwise would be allowed as salary. The letter of Robert Moss of May 28th shows this was the proposition made by him at that time, and so far as the record discloses this was the first and only time the amount of rent was mentioned; and this letter was never answered. What has been said as to the dwelling ap-

plies with even more force to the occupancy of the store. In the promise to employ, the character of the employment was not fixed or determined, nor the amount of salary, nor the duration of the term of employment.

"The law is too well settled" said JUDGE MILLER, in *Thomson v. Gortner*, 73 Md. 475, "to admit of doubt, that in order to constitute a valid verbal or written agreement, the parties must express themselves in such terms that it can be ascertained, to a reasonable degree of certainty, what they mean. And if an agreement be so vague and indefinite that it is not possible to collect from it the full intention of the parties, it is void; for neither the Court nor the jury can make an agreement for the parties. Such a contract can neither be enforced in equity nor sued upon in law."

In the case of *Delashmut v. Thomas*, 45 Md. 140, which was a suit on the breach of a covenant which was in these words; "the said Delashmut to have the preference of renting said property as long thereafter as it shall be rented for a store," the Court said: "Here there is no covenant to renew the former lease, nor any stipulation whatever either as to the time, for which the lessee might have preference or privilege to rent; nor with regard to the rent to be paid. 'A covenant to let the premises to the lessor at the expiration of the term without mentioning any price for which they are to be let \* \* \* is altogether void for uncertainty.' *Taylor Land. & Tenant*, sec. 333. 'Construing the contract in the most favorable way for the lessee, it left to the lessor the absolute right to fix the rate of rent, and the terms upon which he would let the property to the lessee after the expiration of the term. Such a contract was altogether vague and uncertain, and conferred no definite rights upon the lessee which he could enforce either in law or equity.'" See also *Blackistone v. German Bank*, 87 Md. 302; *Gelston v. Sigmund*, 27 Md. 334; *Myers v. Forbes*, 24 Md. 598; *Howard v. Carpenter*, 11 Md. 278 and *Dorsey v. Wayman*, 6 Gill, 59.

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It is equally well settled that no action will lie on the breach of a contract of employment unless there is a definite time fixed for the continuance of the employment. The reason for the rule is that the hiring would be one merely at will and could be terminated at the pleasure of either party. *McCullough Iron Co. v. Carpenter*, 67 Md. 554; *Wood on Master & Servant* (2nd Ed.), sec. 133 and 81; *Blaisdell v. Lewis*, 32 Me. 515; *S. F. & W. R. Co. v. Willett*, 43 Fla. 311; *Louisville & Nashville R. R. v. Offutt*, 99 Ky. 427; *Shaw v. Woodbury Glass Works*, 52 N. J. L. 7; *Harrington v. Brockman Com. Co.*, 107 Mo. App. 418; *Morrison v. Ogdenburg & Lake Cham. R. R. Co.*, 52 Barbour, 173.

In the light of these authorities the conclusion is inevitable that the Court should have instructed the jury that the alleged contract was unenforceable because of its indefiniteness, and vagueness in the essentials we have pointed out.

We are conscious of the feeling that apparently the enforcement of these rules of law under the facts of this case, does not do full justice to the parties, yet it is not for courts to make contracts for parties, but to maintain, unimpaired, the established rules of law.

Although we have found it necessary to declare the contract sued upon invalid for the purpose of sustaining an action, yet, nevertheless, we are strongly of the opinion, that, if the facts are as testified to by the appellee and his witnesses, the appellee is not without a remedy. If he were, it would be a sad reproach upon the law. Still of course, assuming the truth of the facts as established by the appellee, we have on one hand a man giving his efforts and time in securing a thing of value for another in addition to giving up that which may have had value to him, with the expectation of full compensation for his efforts and sacrifices, and on the other hand, a party freely accepting and enjoying these, but unwilling to pay therefor. There can be no doubt, that independently of the alleged contract, the appellee has a right

of recovery for the services rendered for the benefit of the appellant, the W., B. & A. Electric R. R., in securing the lease from his aunt for it, as well as compensation for the surrender of his lease to the premises, if he had a lease that had a value. The testimony of the appellee, standing alone, shows that but for him and his peculiar location, the W., B. & A. Electric R. R. Co. would not, nor could not have secured the present site of their station, and it is too clear for argument that some compensation should be due the one whose labor and sacrifice accomplished this result.

Though we, by our *per curiam* heretofore filed, reversed the judgment for the error already indicated, we will remand the case in order to allow the appellee an opportunity to amend his declaration so as to conform to the views herein expressed, or to dismiss the present action and institute a new suit for the recovery of such compensation as shall be found to be due him for what he did towards the securing of the said lease and the surrender of his own lease and possession, whichever he shall prefer.

*Judgment reversed, case remanded, with  
leave to amend the declaration, with  
costs to the appellants.*

Md.]

Syllabus.

## GEORGE E. FREY

vs.

GEORGE K. MCGAW, FRANK W. HOPPER, JAMES  
R. WARDEN, CO-PARTNERS TRADING AS HOPPER,  
MCGAW & CO., ET AL.

*Judgments: liens; leasehold and real property. Husband and wife: tenants by entireties. Bankrupts: discharge personal; no effect on outstanding liens; judgments, when valid against bankrupt's estate.*

A judgment against joint defendants is an entirety. p. 25

Under Article 26, section 19 of the Code, the entry of a judgment makes it a lien upon the defendant's leasehold as well as his real property, except in certain enumerated cases. p. 25

To perfect such lien no actual levy is necessary. p. 25

A joint judgment against a man and wife, who own real and leasehold property as tenants by the entireties, operates as a lien upon the property so held. p. 25

But where a judgment is recovered against one only of the tenants by the entireties, no lien can attach to the interest of the judgment debtor in such property. p. 25

A judgment lien entered up more than four months before a petition for adjudication in bankruptcy, is valid under the provisions of the Bankrupt Act, unless it be void for some other reason. p. 26

The discharge of a bankrupt is *personal*, and has no effect upon any liens subsisting at the time. p. 26

In general, a plaintiff who has recovered a judgment is not required to look to any one piece of property rather than to

## Syllabus.

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another, for the purpose of enforcing and satisfying it; the only limitation of his right is, that he may have but one satisfaction.  
p. 27

Where a husband and wife own leasehold property, as tenants by the entireties, upon the wife's death, her interest in the property devolves upon her husband, subject to all outstanding liens.  
p. 28

In such a case, the husband's right and title are acquired independent of the medium of administration.  
p. 28

*Decided November 10th, 1915.*

Appeal from Circuit Court No. 2 of Baltimore City.  
(HEUISLER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Frank G. Turner* (with whom was *Jno. M. Dandy, Jr.*, on the brief), for the appellant.

*B. H. Hartogensis*, for the appellees.\*

STOCKBRIDGE, J., delivered the opinion of the Court.

For the decision of this appeal it is scarcely necessary to do more than to understand clearly the facts out of which it arises in their proper relation to one another. On the 3rd of April, 1913, a judgment was entered by confession in the Baltimore City Court in favor of the appellees against George E. Frey and Jennie E. Frey, for the sum of \$270. Being a judgment against joint defendants, it was an entirety. *Ewing v. Rider*, 125 Md. 149.

\*For a synopsis of Mr. Hartogensis' brief in this case, see *addenda, post*.

Md.]

Opinion of the Court.

At the time of the entry of this judgment George E. and Jennie E. Frey, his wife, owned as tenants by entireties, but subject to mortgage, a leasehold lot of ground on Linden avenue in the City of Baltimore. By the provisions of the Code of Public General Laws, Article 26, section 19, the entry of a judgment makes it a lien upon leasehold estates as well as real property, except as to certain enumerated estates, of which a tenancy by the entireties is not one. An actual levy on real and leasehold property is not requisite to perfect the lien. The judgment being an entirety, and the estate of the Freys in the Linden avenue property being one by the entireties, the lien of the judgment attached to the property. What does and what does not constitute a lien depends upon the statutes of each State. *In re Koslowski*, 153 Fed. 823.

The case as presented is entirely different from what it would have been if the judgment had been against either Mr. or Mrs. Frey alone. This arises from the peculiar nature of an estate by entireties. It has been repeatedly held in this State that where a judgment is recovered against one of two tenants by the entireties no lien can attach to the interest of the one, *Jordan v. Reynolds*, 105 Md. 288, and cases there cited, but it has never been held in this State or elsewhere that, in the absence of statutory exemption, where there is an entire judgment against joint defendants, no lien is imposed upon estates or interests in land held by the entireties.

On the 9th of February, 1914, George E. Frey filed his voluntary petition to be adjudicated a bankrupt, and two days later the present appellees, the judgment creditors of Mr. and Mrs. Frey appeared by petition in the bankruptcy proceedings and asked to be allowed to proceed upon their judgment. On February 21st, George E. Frey answered their petition, and in opposition to granting the prayer of the petition, set up the fact that he and his wife had filed a motion in the City Court to have the judgment stricken out. The motion to strike out the judgment was in fact filed on the same day as the answer to the petition. Upon hearing, the

motion was denied on the 13th of March following, and thereafter, on May 5th, the order of the District Court of the United States granting the appellees leave to proceed on their judgment was made absolute. A *fieri facias* was issued upon the judgment, on which a return of *nulla bona* was made. Nothing further transpired until November 7th, 1914, when George E. Frey was discharged in bankruptcy.

No attempt appears to have been made by the bankrupt trustee to make claim to any interest in the Linden avenue property. He probably regarded it as valueless for the creditors, under the doctrine announced in *In re Beihl*, 197 Fed. 870, cited and adopted in *Remington on Bankruptcy*, section 970, page 760, as follows: "In some jurisdictions the common law rule that property held by husband and wife jointly is held in entirety, without possibility of severance, still prevails. Each has only an expectancy, for upon the death of one the other takes the estate; and although the husband's trustee in bankruptcy is undoubtedly clothed with the husband's interest, whatever that may be, his right to it must await the contingency of the husband surviving the wife."

About two months after the discharge, namely, on January 26th, 1915, Jennie E. Frey died, and by operation of law the entire estate in the Linden avenue property was then vested in George E. Frey, but it necessarily was subject to any valid outstanding liens against the property, whether such lien was in the form of a mortgage, or a judgment which by statute was made a lien upon real and leasehold estates. The judgment lien of the appellees was not void under the Bankrupt Act, section 67, having been entered more than four months prior to the petition for adjudication of bankruptcy, nor was it void for any reason in its obtention. This was established by the Baltimore City Court when it overruled the motion to strike out the judgment. The discharge of the bankrupt was only personal to the debtor. It was entirely without effect as to any liens subsisting at the time.

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*Collier on Bankruptcy*, p. 362; *Remington on Bankruptcy*, section 2668; *Blick v. Nimmo*, 121 Md. 142.

The writ of *fi. fa.* issued in May, 1914, having been returned *nulla bona*, the appellees in April of this year, 1915, again directed the writ to issue, and under that a levy was made upon the Linden avenue property. The bill in this case was then filed by George E. Frey to restrain proceedings under the writ. A demurrer to the bill was interposed and sustained, and the bill was dismissed "without prejudice to the right of the complainants to proceed in the case pending against him in the Baltimore City Court, being the execution by way of *fieri facias* on a judgment in said Court in the matter of George McGaw *et al.* v. *George Frey and Jennie Frey.*"

It was earnestly argued in support of the demurrer that there was a complete, adequate remedy at law, and for that reason alone the demurrer should be sustained. This Court is not called on to rule specifically on this point in the present case, and without so deciding it may well be that conditions might arise in which it would be appropriate for the equity court to take jurisdiction, even though there was a remedy at law of which a plaintiff might avail himself.

Among other grounds it is urged in behalf of the appellant that Jennie E. Frey left other property than that on Linden avenue against which the defendants in this suit might have proceeded, and that though administration has been granted upon her estate there has been no attempt to bring her representatives into these proceedings. The answers to both of these contentions are obvious.

A plaintiff who has recovered a judgment is not required to look to any one piece of property rather than another for the purpose of enforcing it. He may proceed against such property of his debtor as he thinks most likely to produce sufficient to satisfy his claim, in the easiest and least expensive manner. The only limitation to which he is subject is that he is entitled to have but one satisfaction of his claim.

To the second objection the answer is, that the Linden avenue property formed no part of the estate of Jennie E. Frey. Upon her death the interest to which she had been entitled devolved, by operation of law, upon her husband, subject to all valid outstanding liens. He acquired no right in it through the medium of administration upon her estate. So far as this property was concerned, therefore, her representatives were neither necessary or proper parties to the proceeding.

From the foregoing considerations it follows that the Circuit Court No. 2 of Baltimore City was correct in sustaining the demurrer and dismissing the bill. This Court can not agree with that portion of the decree, which makes the dismissal of the bill "without prejudice to the right of the complainants to proceed in the Baltimore City Court." As already shown, the judgment was an entire one, *Ewing v. Rider, supra*; a motion to set it aside had been made on behalf of both defendants, and denied. Nothing appears to have been done in the City Court subsequent to the issue of the writ of *fi. fa.* in April of this year, and nothing could have been done by a judgment debtor who died before the issuance of the writ. Nor is any valid reason given in the bill to justify a quashing of that writ. There was, however, no appeal taken by the appellees, and therefore, the question of the propriety of so much of the decree as dismissed the bill "without prejudice to the right of the complainants to proceed in the Baltimore City Court," is not before us for any action.

*Decree affirmed, the appellant to pay the costs.*

Md.]

Syllabus.

EDWARD J. SIMOND

vs.

STATE OF MARYLAND.

*Criminal law: bill of particulars, discretion of Court. Practice: address to jury; right of Court to correct erroneous statements of the law. Indictment for conspiracy: effect of turning State's evidence. Verdict: form of appeals; non-reversible error.*

While the jail record of a witness may be inquired into, or proved, in order to affect his credibility, evidence of his being confined in jail, 10 years previously, on a conviction for drunkenness, is not material on a trial for election frauds. p. 39

Action upon a demand for a bill of particulars, in criminal as well as in civil proceedings, is a matter that rests within the sound discretion of the Court. pp. 31-32

A count in an indictment had been divided into two paragraphs, and the first paragraph stated all the facts necessary in order to fully inform the traverser of the time, place, etc., of the occurrences of the acts with which he was charged. It was: *Held*, that it was not necessary to repeat those parts in the subsequent paragraph of the count, where there was no room for doubt as to what was meant. pp. 32-33

It is the right and may be the duty of a judge to express his dissent from unwarantable statements of law made by counsel in addressing the jury. pp. 33-34

The mere fact of turning State's evidence, and testifying in the case against others charged as co-conspirators, does not operate as a grant of immunity to a traverser indicted for conspiracy. pp. 33-34

The ruling of a lower court should not be reversed on appeal, even though erroneous, if no injury or prejudice were caused thereby. p. 34

In criminal trials, the form of the jury's verdict may be "Guilty" merely, or "Guilty on" one or more counts, specifying which ones; or "Not Guilty" merely, or "Not Guilty on" one or more counts, in conjunction with the finding of guilty on others. p. 40

During the course of a criminal prosecution where the Court, in the presence of the jury, made a statement as to the law bearing upon a question before them, no reversible error is presented if the Court subsequently informs the jury that his comments were advisory merely, and that the jury were the judges both of the law and of the facts. p, 40

*Decided November 11th, 1915.*

Appeal from the Criminal Court of Baltimore City. (BOND, J.)

The facts are stated in the opinion the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Edward L. Ward*, for the appellant.

*R. R. Marchant*, *Deputy State's Attorney* (with whom was *Edgar Allan Poe*, the *Attorney-General*, and *Wm. F. Broening*, *State's Attorney*, on the brief), for the appellee.

BOYD, C. J., delivered the opinion of the Court.

The appellant was indicted in the Criminal Court of Baltimore City for conspiracy. There are four counts in the indictment, the first of which charges

"that on the sixth day of October, in the year of our Lord nineteen hundred and fourteen, there was in the First Precinct of the Third Election District of Anne Arundel County, in the State of Maryland, a general registration of voters as by law provided, and that there was then in the said precinct of said election district of said county a meeting of a Board of Registry, duly appointed, qualified and organized, held for the purpose of said general registration of voters in said precinct of said election district of said county, as by law provided;

"And that Edward J. Simond, otherwise called Edward J. Simon, late of said city, on the said sixth day of October, in the year of our Lord nineteen hundred and fourteen, at the city aforesaid, unlawfully did con-

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spire, combine, confederate and agree with Jacob Knight, Frank S. Revell, William J. Fitzpatrick and George L. Noel to procure unlawfully and fraudulently to register in said election precinct, that is to say, in said First Precinct of said Third Election District of said county, divers persons not then having a legal right to register therein; against the peace, government and dignity of the State."

The second count is the same, except it alleges that the traverser unlawfully did conspire, etc., with said four persons "and with certain other persons whose names are to the jurors aforesaid unknown, to procure unlawfully and fraudulently to register," etc. The third count alleges that the traverser unlawfully did conspire, etc., with the four persons named "to procure divers persons unlawfully to register in and under certain names, not the names of such persons to be procured to register, at the general registration of voters aforesaid, and at the meeting of the said Board of Registry so held for the purpose of said general registration of voters, in said precinct," etc. The fourth count is the same as the third count except it alleges that the traverser unlawfully did conspire, etc., with those four "and with certain other persons whose names are to the jurors aforesaid unknown, to procure divers persons," etc.

The defendant made a demand for a bill of particulars, which was refused. He demurred to the indictment, and each count thereof, and the demurrer was overruled. He then entered a plea of not guilty and upon a trial before a jury was convicted. After motions for a new trial and in arrest of judgment were overruled, judgment was entered and he was sentenced to confinement in jail for one year. From that judgment this appeal was taken. In addition to the rulings on the demurrer and the demand for a bill of particulars there are forty-one exceptions in the record presenting the rulings of the Court in reference to evidence.

1. There can be no difficulty about the demand for a bill of particulars, as that is a matter generally resting within

the sound discretion of the trial Court, *Lanasa v. State*, 109 Md. 602, and there is nothing in this case to bring it within any exception to the rule.

2. Section 89 of Article 33 of the Code provides:

“If at any general registration of voters or at any meeting of a Board of Registry held for such purpose or for revision thereof, as provided in this article, any person shall falsely personate a voter or other person, and register or attempt or offer to register in the name of such voter or other person, or if any person shall register or attempt to make application to register in or under the name of any other person, or in or under any false, assumed or fictitious name or in or under any name not his own; or shall register in two election precincts; or having registered in one precinct shall attempt or offer to register in another; or shall fraudulently register or attempt or offer to register in any election precinct, not having a legal right to register therein \* \* \* every such person, upon conviction thereof shall be punished by imprisonment in jail or in the penitentiary for not less than six months nor more than five years.”

Objection is made to the first and second counts because they, to quote the brief, “do not sufficiently aver the alleged offense in that they do not charge: 1. At *what registration* the traverser procured unlawfully to register divers persons; nor 2. Before what board this unlawful registration was had; nor 3. The *purpose* of said registration.” In the first part of those counts, it is distinctly alleged that there was on the 6th day of October, 1914, in the precinct named *a general registration* of voters as by law provided, and that there was then in said precinct a meeting of the Board of Registry duly appointed, qualified and organized, held *for the purpose* of said general registration of voters in said precinct, as by law provided; and it then goes on to allege that the traverser on *the said* sixth day of October, 1914, unlawfully did conspire, etc., with the four named “to pro-

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cure unlawfully and fraudulently to register in *said election precinct*, that is to say, in *said* first precinct of *said* third election district of *said* county, divers persons *not then* having a legal right to register therein." It might perhaps have been better to have gone on to state, as was done in the third and fourth counts, "at the general registration of voters aforesaid," etc., but the traverser could not possibly have been left in doubt as to *what registration, what board or what purpose* was meant. The prior part of those counts of the indictment had informed him of all that was necessary, and there could have been no possible reason for stating what was alleged in that part of the indictment if the latter part referred to some other registration, board, etc. The State was called upon to prove the facts set out in the first part just as it would have been if they had been repeated in the latter part of the counts. There can be no question about the third and fourth counts, and we will not refer to the demurrer further, except to say that in our judgment the cases of *State v. Buchanan*, 5 H. & J. 317; *Lanasa v. State*, 109 Md. 602, and *Garland v. State*, 112 Md. 83, fully sustain the sufficiency of this indictment.

3. It would prolong this opinion beyond a reasonable length to discuss separately each exception, and, as far as can be conveniently done, we will group them. The first was taken in course of the opening statement of the attorney for the traverser. Without quoting all that was said by him, some statements of law by him were unquestionably not "entirely accurate in every respect," to use the language of the trial Judge. It may be that the attorney intended them to be qualified by what he said at other places—that the traverser could not be convicted by the *uncorroborated* or *unsupported* testimony of the co-conspirators—but he had at times omitted that qualification, and had also given as one reason for the rule, "that a man might come in and say that an innocent man was a party to the conspiracy, and would procure immunity for himself; because, when he takes the witness stand, he is immune." That is not the law of this

State, and such a rule would be a dangerous one to announce, as thus broadly stated. There was nothing in the case to show that there was any understanding or agreement with the prosecuting officer, approved by or known to the Court, that either of the alleged co-conspirators should be immune if he testified fully and truthfully as to the matter charged, as was spoken of in *Lowe v. State*, 111 Md. 1, and there is nothing in that opinion which would justify such a startling and dangerous proposition as that just quoted from the opening statement. That opinion concludes by showing that even under the circumstances of that case, if the State's Attorney declined to discontinue the case or the Governor declined to grant a pardon, the Court would be relieved of further responsibility, but it was not suggested that it could give relief. When, then, objections were made to the statement, the Court might have been even more emphatic than it was in its disapproval. CHIEF JUDGE ALVEY said in *Garlitz v. State*, 71 Md. 293, that it was "certainly the right of a Judge, and it may often be his imperative duty to exercise" the right to give his full and emphatic dissent from the unwarrantable contention of counsel while arguing a question of evidence before the Judge, "in a very positive and emphatic manner." That was said by him in reference to a trial for murder. If it can be done during an argument before the Judge on a question of evidence, surely it can be during an opening statement, as otherwise a jury may be utterly misinformed as to their duties.

We have thought it proper to say this much, but if there could have been any possible injury done by the very moderate statement of the Judge, immediately following the exception there appear statements of the attorney and of the Court which removed all possible danger of the traverser being injured by anything presented in the first bill of exceptions, and hence we need not say more on the subject.

4. Before passing on the other exceptions it will be well to recall some of the leading facts disclosed by the record, in order that the questions raised may be better understood.

Md.]

## Opinion of the Court.

The traverser had conducted a saloon at Curtis Bay, in Anne Arundel County, about six years. He bought a place in Stony Creek and moved there the latter part of March or first of April, 1914. He had a hotel there and also ran a general store. On his place is a steamboat wharf at which the Stony Creek boat stops. He had been registered at Curtis Bay, but after he moved to Stony Creek he registered in the first precinct of the third district of Anne Arundel County. The general registration days in 1914, for registering voters in that county, were September 22nd and 23rd and October 6th and 7th. Jacob Knight and George L. Noel, two of those named in the indictment, with whom Simond was alleged to have conspired, had been indicted and plead guilty prior to the trial of Simond. Mr. Revell, another named in the indictment, who was a member of the State Central Committee and was active in getting voters to register, had not then been tried.

Noel was called by the State. He testified that he lived at 300 East Hamburg street, Baltimore, and that he was registered in the 24th Ward of that City. He said he had known the traverser about fifteen years and had done some sign-painting for him at his place in Stony Creek; that on Monday, October 5th, he met him on Light street in Baltimore and had a talk with him about some work; he said: "I saw him later in the day and he told me to meet him at Ferry Bar at half-past eight, and I met him and there was a boatload of men there and we all went together." He was asked: "What, if anything, did he say he wanted you to do down there when he met you?" The Court overruled an objection to that question, and that ruling constituted the second exception. As the witness replied: "He told me he was going to have a registration down there, and he asked me to come down and register"; and furthermore that he did go down, and when he got to Ferry Bar "he had a boatload of men there, some drunk and some sober, and we all got on the boat and went down," there can be no question about the relevancy of the inquiry and the objection was undoubtedly

properly overruled. The third exception was to the question, "He said he was going to have registration down there?" He replied to that: "He told me to try to get some men to go along down. I said, all right, I would if I could, but I did not ask him about it. He said he would be up the next morning and see me, and he came up the next morning." While that question repeated what he had already testified to, it was not reversible error to allow it to be asked. Noel then said the traverser came to his house about eight o'clock on Tuesday morning; they had a couple of drinks at a saloon, and there were five or six men there—one named Treacle, one named Carl, and others whose faces he knew but not their names. Simond called him outside and said: "Don't forget, George, and I said, 'All right, I will be there.'" "He asked me if I was coming down; I said, Yes. He said: 'If you see anybody you know, ask them to come along, but don't coax anybody.' I said: 'All right,' and he gave me a dollar and I went and spent it for booze." He and Treacle walked out of the bar, went down to Light street and on their way met Carl, who said: "'Where you fellows going?' I said, 'Stony Creek.' He says: 'Can I go along?' I said, 'I don't care a d—— who goes.'" That answer was objected to, and the fourth exception was taken to the action of the Court in overruling the objection. As Noel was one of the alleged conspirators we can see no objection to that ruling. The evidence tending to show a conspiracy which had already been offered was ample to justify the admission of his statements under such decisions as *Bloomer v. State*, 48 Md. 521, and *Lawrence v. State*, 103 Md. 17. The witness then testified that Carl went down with them. They went to Ferry Bar on the car, and the next car brought "a bunch of fellows down." He said Simond put one-half of the men in a boat and sent them across the river, and the boat came back and the other half went over. He also said Simond telephoned over to see if everything was all right, and stated he had just had Sheriff Revell on the phone and everything was all right; that after that the fellows did not hesitate to go. He was

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asked if he heard anyone say anything about money before they went across, and replied: "Yes; Bud Abbott spoke up and said, 'What are we going to get for this?'" An exception was taken to allowing that question. The answer shows its relevancy, as he testified, "Simon said, 'Well, g—— d—— it, I will give you two dollars; will that satisfy you?'" There certainly can be no objection to that, which constituted the fifth exception. In the sixth, Noel said he registered in the name of Samuel Kelley, signed the registration book, and the traverser objected to exhibiting the registration book to him, but that needs no comment, as it was clearly admissible for the purpose of corroborating Noel, as well as for other reasons. The Court struck out the objectionable part of the seventh. The eighth, ninth and tenth show conduct of traverser which clearly reflected on his guilt. The eleventh is similar to the sixth. The twelfth and thirteenth were in regard to Simond trying to engage the boat of one Thomas W. Johnson for the next registration. There can be no difficulty about that, excepting there was some question as to the date. As on motion to exclude the testimony in the fourteenth exception, the Court said it would exclude it unless the State proved that the last registration day was subsequent to the conversation, and as the State did subsequently offer evidence tending to further prove that, there was no error in those rulings. In the fifteenth, sixteenth, seventeenth and eighteenth the clerk to the Supervisors of elections was asked to identify the registration book of the precinct in question, to name the board of registry for that precinct, to name the days of registration, and was asked whether any new names could be put on the book on the day of revision. There was no reversible error in any of the rulings in those exceptions. It may be said that the statute, and not the clerk, should have been relied on to prove whether any new names could be added on revision day, but the State was simply endeavoring to show the time of the last registration, and the traverser could not possibly have

been injured by letting the clerk say what the statute said, as there was no doubt about it. In the nineteenth the motion to strike out the evidence referred to in the fourteenth was finally overruled. There was no error in that. The twentieth and twenty-first were in reference to Mr. Revell engaging teams of W. T. Moore to bring men from Stony Creek and to his saying he had just received a telephone message. As Mr. Revell was alleged to be a co-conspirator, there can be no doubt about that evidence being admissible, although it was not important. The twenty-second was to what Simond said about having a launch for the next registration day, October 6th. The twenty-third and twenty-fourth could do no possible harm, but might have helped the traverser, if they had any effect. They simply showed that Mr. Revell was trying to get men registered who had the right to register. The twenty-fifth was to allowing the witness Treakle to say whether Noel said anything to him on Monday about the registration. He replied: "He said he was going to take a little trip the next day. He didn't tell me to register." He immediately followed that by saying that Noel told him Simond would be around the next morning, and that Simond came that morning, "asked him to take a trip down to Anne Arundel and they would have a little good time, as they were going to have a fake registration." He corroborated Noel on several matters. There was no error in the exception. The objection in the twenty-sixth was to asking Treakle whether anyone raised the question about how much money they would get. What we have said about the fifth exception is sufficient. As the Court said the question in the twenty-seventh was immaterial, and the State's Attorney said he would strike it out, it would be a waste of time to discuss it. The twenty-eighth was of but little consequence, but admissible. There can be no valid objection to the twenty-ninth. The objection in the thirtieth was to ruling out a question asked Jacob Knight whether he was arrested on September 25th, 1905, for being drunk on the street, fined

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and sent to jail. Although this Court said in *Smith v. State*, 64 Md. 25, that a witness could be asked whether he had ever been confined in jail, and in *McLaughlin v. Mencke*, 80 Md. 83, whether he had been in jail and for what, it would be certainly carrying the rule to its limit to ask a witness if he had been arrested ten years before for being drunk and sent to jail. The object of such testimony is to reflect upon the credibility of the witness, and it would be pretty close to reflecting upon the intelligence of the jury to suppose they would be influenced in passing on the credibility of a witness by evidence of such an incident happening ten years before. But regardless of that, could that evidence possibly have any effect, or be of use to any twelve men fit to sit in a jury box, when the witness had acknowledged that he had registered fraudulently and was then confined in jail? The law should not thus be made so helpless as to require a judgment to be reversed for that ruling, under the circumstances, even if conceded to be erroneous.

The objection in the thirty-first exception to the admissibility of the certificate of the Board of Registry was not well taken. It was followed up by evidence that the registrar, who testified to his own signature, had taken the book to the Board of Supervisors of Elections. The certificate is in the form prescribed by section 24 of Article 33. In the thirty-second exception the object of the State was to show flight after a warrant was issued for the traverser, and the thirty-third in explanation of what the witness had previously said. The thirty-fourth, thirty-fifth and thirty-sixth exceptions can not be material in any way. The witness Revell did testify, and therefore any warnings that were given him in reference to his right to refuse to answer any questions which might incriminate him were of no practical importance. The thirty-seventh exception was taken to admitting the registration book and the signature of the witness Watts, who had registered, as Keeler, for comparison by the jury. In the thirty-eighth exception objection was made to remarks

of the Court in which the Judge expressed his views on certain questions. As he had not distinctly informed the jury that what he said was merely advisory, the Deputy State's Attorney called his attention to that fact, and the traverser excepted to that action, which is the thirty-ninth exception. The Court then stated when it was brought to his attention: "That is perfectly proper. It follows from the rule that the jury are the judges of the law and of the facts. Any instructions which the Court has given are advisory merely. You are the judges of the law and of the fact." That was in the fortieth exception, and sufficiently corrected any error which might have previously existed. The forty-first exception arose in this way: After the jury had retired and had been out for some time, the foreman wrote to the Court: "Should the verdict be on any particular count, or does the first count cover all others?" The Court answered, in writing, as follows: "You may find a verdict of 'Guilty' merely, or of 'Guilty on' one or more counts, specifying which ones; and you may find a verdict of 'Not Guilty' merely, or of 'Not guilty on' one or more counts, in conjunction with the finding of guilty on others." There was no error in that instruction.

We have thus as briefly as we deemed proper referred to the various exceptions. We have not attempted to refer to all of the evidence offered by the State tending to prove the conspiracy, and although the traverser and several of those alleged to be co-conspirators denied the conspiracy and contradicted much of the evidence offered on the part of the State, the jury found the traverser guilty. It was the province of the jury to determine his guilt or innocence, and as we find no reversible error in any of the rulings of the Court the judgment must be affirmed.

*Judgment affirmed, the appellant to pay the costs.*

Md.]

Syllabus.

JAMES A. MULKERN

vs.

STATE OF MARYLAND.

*Indictments: sufficiency; essential facts; statutory offenses.**Liquor laws: Chapter 179 of the Acts of 1908.*

All the essential elements necessary to constitute the offense charged must be stated in the indictment. p. 43

Where an indictment is framed under a section of a statute, it must charge the traverser with the statutory offense created and defined by that section. p. 43

In order to be able to convict a traverser for the sale or giving away of liquor in violation of section 10 of Chapter 179 of the Acts of 1908, it must be alleged in the indictment that the liquor was sold or given away "at the traverser's" *place of business*. p. 44

*Decided November 11th, 1915.*

Appeal from the Circuit Court for Baltimore County.  
(DUNCAN, J.)

The facts are stated in the opinion of the Court.

The cause was submitted to BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Elmer J. Cook* and *Wm. H. Lawrence* submitted a brief for the appellant.

*Edgar Allan Poe, the Attorney-General, and George Hartman, State's Attorney for Baltimore County,* submitted a brief for the State.

BURKE, J., delivered the opinion of the Court.

The Act of 1908, Chapter 179, made provisions for the regulation of the sale and the granting of licenses for the sale of spirituous and fermented liquors in Baltimore County. The Act, after declaring how and upon what conditions the license might be granted, provided, among other things, in section 10, "That no person having a license under the provisions of this Act shall sell or give away any spirituous or fermented liquors \* \* \* *at his place of business* between the hours of twelve o'clock midnight and five o'clock A. M. at any time."

The appellant, James A. Mulkern, had been granted a license under the provisions of this Act to sell spirituous and fermented liquors in Baltimore County. He was indicted under section 10 of the Act for having violated the provisions quoted above. The indictment contained two counts. The first count, after alleging the jurisdiction and that the traverser was a licensed dealer under the Act, charged that he "unlawfully did sell a certain William D. LeFevre a certain quantity of fermented liquor, to wit: beer, between the hours of twelve o'clock midnight and five o'clock A. M., contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State." The second count was identical with the first

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with the exception that it charged that he gave away the beer. The appellant demurred to the indictment. The demurrer was overruled. He then pleaded not guilty, and upon the issue joined upon this plea he was tried by a jury, was found guilty, and adjudged to pay a fine of \$200 and costs. From this judgment he has prosecuted this appeal.

The single question is this: Does the indictment charge the appellant with an offense within the terms of section 10 of the Act of 1908, Chapter 179? The indictment was framed upon that section, and to be valid it must charge the traverser with the statutory offense created and defined by the section. The offense created by the section is the sale or giving away by the licensee, *at his place of business*, spirituous and fermented liquors during the prohibited hours mentioned. It is not a violation of *this section* of the Act for a licensee to sell or give away in Baltimore County spirituous or fermented liquors at a place other than his place of business at any time or during any hour. For such an act he would doubtless be indictable, but the indictment must be framed under a different section of the Act. The indictment omits to state a fact essential to be found before there could be a conviction for the offense created by the section under which the indictment was framed, viz., that the fermented liquor was sold, or given away at the traverser's *place of business*. This being an essential fact or element to constitute the offense it was necessary to allege it in the indictment, and the omission of that allegation rendered the indictment fatally defective. It did not describe the offense created by the statute. The rule of pleading applicable to indictments for statutory crimes is thus stated in 10 *Ency. Pl. & Prac.* 483 to 486: "While it is essential that all the facts constituting an offense must be so stated as to bring the defendant precisely within the law, it is a rule of universal application that when a statute creates an offense and sets out the facts which constitute it, the offense may be sufficiently charged in the language of the statute. In some cases, it has been held that the exact language of the statute

must be used in charging an offense which is defined by statute, but the prevailing doctrine is that although every ingredient of the offense described must be set out, it is not necessary to use the exact language of the statute, words of equivalent import being sufficient, and it is enough substantially to charge the offense denounced in the statute. It is said, however, to be the more usual and the safer practice to pursue the exact language of the statute, because it is not likely that more apt and appropriate expressions can be employed to convey the meaning of the Legislature than the words which the Legislature itself employed for that purpose." In a note to this statement of the rule it is said that: "This rule is so well known and universally accepted as hardly to require citation of authorities to support it; and while the reader will find the statement well fortified with cases under the treatment of each specific offense in the criminal law in this work, the following cases announcing the general proposition, as stated in the text, are selected from the great mass for reference in connection with variations of the principle hereinafter to be stated."

Numerous cases in 25 States, including Maryland, are cited in support of the rule.

There is nothing in the case of *Mitchell v. State*, 115 Md. 360, in conflict with the conclusion we have here announced. In that case the Court was dealing with the Act of 1908, Chapter 27, which in express terms prohibited the sale of spirituous, fermented and intoxicating liquors within the limits of Worcester County. The Court held that, upon a proper construction of the statute that: "The use of the words in the statute, 'to give away or otherwise dispose of it at a place of business,' was not intended to allow the sale of intoxicating liquors in the county at other places than 'a place of business,' but they were inserted for the purpose of enlarging the prohibition, and making it unlawful, to give or otherwise dispose of it, under any other circumstances and conditions, at a place of business, than those previously named in

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the statute. It was not, therefore, necessary to allege, that the sale was made 'at a place of business,' conducted by the traverser, because it was unlawful under the provisions of the statute to sell directly or indirectly spirituous or intoxicating liquors at any place whatsoever within the limits of Worcester County. This is clear both from the title, and the provisions of section 2 of the Act itself."

It is manifest that what was there said can have no application to the Act of 1908, Chapter 179, relating to the sale of spirituous and fermented liquors in Baltimore County, because that Act does not prohibit the sale of liquor in that county by one having a license, and the only prohibition against a licensee selling or giving away liquors during certain specified hours is contained in that portion of section 10 above quoted. As the indictment failed to charge the appellant with the commission of an indictable offense the demurrer should have been sustained, and therefore the judgment in this case must be reversed.

*Judgment reversed.*

WALTER P. BAVINGTON

vs.

WILLIAM E. ROBINSON.

*Slander: justification as to some charges only; criminal charges; good character and reputation. Privileged communications: express malice. Damages: feelings; evidence. Rebuttal: re-examination of witnesses; discretion of court.*

In an action of slander the defendant may justify as to one or more of the separate charges. p. 48

A plea of justification can not be required to apply to words which the defendant denies having spoken. p. 48

In an action of slander, the plaintiff may properly testify as to the effect upon his feelings of the defamatory words. p. 48

In an action of slander, where the plaintiff has already testified to his innocence and good faith, in the matter concerning which the slanderous charge was made, it is not reversible error to exclude his further testimony negating the imputation of criminality. p. 49

The ruling of the lower court upon the propriety of a question it was proposed to ask a witness, is not open to review on appeal, when the question does not appear from the record to have been answered. p. 49

On the re-examination of a witness in rebuttal, it is within the discretion of the trial court, whether or not a subject upon which he had been examined in chief, should be reopened. p. 50

In an action of slander, where the words charged impute crime, and are sought to be justified by pleading and proof, the plaintiff should be allowed in rebuttal to prove his good reputation with respect to the element of character affected by the defamation. p. 52

Even where a statement may be privileged, it may be the basis for a recovery of damages in an action of slander, if defendant, in making it, was actuated by express malice. p. 53

*Decided November 11th, 1915.*

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Opinion of the Court.

Appeal from the Circuit Court for Baltimore County (DUNCAN and McLANE, JJ.), to which Court the case had been removed from Harford County.

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*John S. Young and John S. Ensor* (with whom was *Harry S. Carver* on the brief), for the appellant.

*Thomas H. Robinson* (with whom were *John Mays Little* and *Benson & Karr* on the brief), for the appellee.

URNER, J., delivered the opinion of the Court.

The general rule of law applicable to this case was settled upon a former appeal reported in 124 Md. 85. It was then determined that there was legally sufficient evidence of actual malice to be considered by the jury as against the defense of privilege and justification in respect to a part of the alleged slanderous statements. This conclusion led to the remanding of the case, and in the new trial which has since occurred a verdict was rendered in favor of the defendant. From the judgment entered on this finding the plaintiff has again appealed. There are twenty-eight bills of exceptions in the present record, relating to the evidence and prayers offered in the case, and there is also a question raised by demurrer to one of the defendant's pleas.

The ruling on the demurrer will be first considered.

It was alleged in the fourth and fifth counts of the declaration that the defendant falsely and maliciously spoke and published the following words addressed to the plaintiff: "Don't you know you are stealing my corn? Well, you are. Don't you know you are criminally liable? You are." I am going to see the State's Attorney. You have been robbing me long enough." The defendant pleaded the general issue to the declaration as a whole, and filed a special plea to the fourth and fifth counts. By this plea it was denied that the

defendant had used any of the alleged slanderous expressions, except the words inquiring whether the plaintiff did not know he was criminally liable and stating that the defendant was going to see the State's Attorney. The speaking of these words was admitted and was sought to be justified in the plea on the ground that they referred to the plaintiff's conduct in selling and failing to account for certain corn upon which he had given the defendant a bill of sale as security for a loan. The objection made to the plea on demurrer is that it attempts to justify only a portion of the utterances alleged in the counts to which it is directed. It is argued that the justification, to be a complete defense, must be co-extensive with the charge. This proposition is sound in principle, but it is not at all opposed to the theory and validity of the plea. It was not proposed to present by the plea a complete defense to the suit by way of justification. An important feature of the defense was a denial of the charge to the extent indicated. It was only the admitted utterance that was sought to be justified. The plea could not be required to include a justification of words which it asserted had in reality not been spoken. The entire charge contained in the counts was definitely met by the plea, in the only way consistent with the facts upon which the defendant wished to rely. As the alleged defamatory words consisted of several distinct statements, it was clearly permissible for the defendant to justify as to one or more of the separate charges. 25 Cyc. 464, and cases there cited. The demurrer to the plea was properly overruled.

The first exception was taken to the refusal of the Court to allow the plaintiff, when testifying, to state how he was affected by the defendant's words and manner in uttering the alleged slander. The right of the plaintiff, in an action of slander, to testify as to the effect upon his feelings caused by the defamatory words, has been recognized in *Chesley v. Tompson*, 137 Mass. 136; *Rea v. Harrington*, 58 Vt. 181; *Mills v. Flynn* (Iowa), 137 N. W. 1082, and other cases. In the first of those just cited the Supreme Judicial Court of Massachusetts said: "In all cases in which the plaintiff

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is entitled to recover damages for mental suffering, evidence of the actual suffering caused by the act of the defendant is admissible; and since parties have been admitted as witnesses, the testimony of the plaintiff as to his sufferings is admissible, for he knows best what he has suffered. His interest in the action only affects his credibility. Damages for mental suffering resulting from the publication of the slander are not special damages, which must be specially alleged in the declaration." In our opinion the plaintiff was entitled to answer the question to which the first exception refers, and we are, therefore, unable to concur in the ruling by which the objection was sustained.

The second and third exceptions relate to the disallowance of questions propounded to the plaintiff, by his counsel, as to whether he had robbed the defendant or had stolen his corn. In the course of his testimony the plaintiff had fully described his conduct, and asserted the honesty of his purpose, in disposing of the corn in question, and had given his reasons for not accounting for the proceeds more promptly. It was to this transaction that the accusation against him is conceded to have had exclusive reference. As he had thus testified to his good faith and the innocence of his intentions, we see no prejudice to his interests in the refusal of the Court to permit him to further negative the imputation of criminality, even if it be assumed that such testimony would have been competent in the case as developed, which is a question not necessary to be decided.

As the interrogatory to which the fourth exception refers, and to which an objection was overruled, does not appear to have been answered, the ruling on this point is not reviewable.

By the fifth and sixth bills of exceptions it is shown that the plaintiff was allowed to be asked on cross-examination, over the objection of his counsel, certain questions in reference to the amount of his indebtedness to the defendant remaining unpaid at the time of the execution of the bill of sale we have mentioned. As the case was presented an in-

quiry as to the financial relations of the parties was relevant and properly permitted.

The seventh and eighth exceptions have been abandoned.

The ninth exception is immaterial, the testimony it refers to as being excluded at that point having already been offered and admitted.

There was no error in the rulings on the 10th, 11th, 12th, 15th, 16th, 17th, 18th, 19th, 20th, 21st and 22nd exceptions. They all relate to the admission of evidence which was clearly pertinent to the issues.

The testimony objected to in the 13th and 14th exceptions was similar in character to that involved in the 5th and 6th exceptions, which we have held to be competent.

While the questions mentioned in the 23rd, 24th and 25th bills of exceptions were relevant, it appears that the witness to whom they were addressed had met the point of the inquiries in his previous examination by the same party, and we see no error in the refusal to allow the questions to be further pressed.

The 26th exception has reference to an offer of evidence in rebuttal as to a fact about which the plaintiff had testified in chief and which was a proper element of his case, as primarily developed. In declining to permit the subject to be reopened in rebuttal the Court exercised a discretion with which we find no occasion to interfere. *Harris v. Hipsley*, 122 Md. 435.

The 27th exception questions the correctness of the Court's action in excluding testimony proffered on behalf of the plaintiff in rebuttal, with a view of proving his reputation for honesty. In *Dorsey v. Whipps*, 8 Gill. 457, the plaintiff, in a suit for slander which imputed larceny, having proved the words charged, and others not mentioned in the declaration, the defendant offered evidence for the purpose of justifying the *additional* words attributed to him, and the plaintiff was then allowed, over objection, to prove his reputation for integrity. This was held to be error. But in *McBee v. Fulton*, 47 Md. 431, the plaintiff, in order to rebut evidence tending to justify a charge that he had made an inde-

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cent exposure of his person, offered to prove that he was a man of good moral character, and while the offer, in this general form, was disallowed, he was permitted to show his good character for delicacy, modesty and chastity. This restriction was excepted to but was approved on appeal. It was held that the plaintiff's object being to repel the proof of justification and to show his innocence by evidence of good character, the testimony offered for that purpose should be confined to the traits involved in the imputed offence. The opinion in that case observed that upon the general question of character evidence, in actions like the present, there was much apparent conflict of authority; but it was found not to be necessary to review or attempt to reconcile the decisions on the subject as the specific point involved did not require a determination as to the general admissibility of proof in such cases as to the plaintiff's character.

The justification pleaded in the pending case was directed to the statement that the plaintiff was criminally liable for selling corn, upon which the defendant held a bill of sale, and failing to account for the proceeds. The use of the other defamatory words charged in the declaration was denied by the defendant both in his pleadings and in his testimony. It was undisputed in the case that the corn had been sold by the plaintiff and that he had not paid over the proceeds at the time of the alleged slander. According to his testimony, the purchase money for the corn had not been fully collected and he promised and intended to pay the whole amount to which the defendant was entitled. As tending to refute the theory that he had been guilty of any criminal intent in the transaction it was desired by the plaintiff to prove that he had a good reputation for honesty and integrity in the community in which he lived.

While there is a wide divergence in the decisions on the subject, we think the rule best supported by reason and authority is that where the words charged impute a crime and are sought to be justified by pleading and proof, the plaintiff should be allowed to prove his good reputation with

respect to the element of character affected by the defamation. A number of the cases dealing with the question are collected in 25 *Cyc.* 514, and the statement of the text is that: "If the words charge a crime, it is generally held that plaintiff may show his good character in rebuttal of evidence in justification." As remarked in *McBee v. Fulton, supra*, the question presented is the same as if the party "were on trial for the offense and sought to adduce evidence of character in his defense. In such case the character to be proved must not be general, but such as would make it unlikely that the accused would be guilty of the particular crime with which he is charged." The offer is here limited to proof of reputation for honesty and integrity, which are the only traits involved, and we think the proffered evidence on that subject should have been allowed to be introduced.

In order to simplify the discussion of the questions raised by the remaining exception, which is concerned with the prayers, the rule of liability announced on the former appeal will be restated. As the evidence tended to support the theory that the words complained of were to be regarded as a privileged communication, in view of the defendant's interest, in common with that of the plaintiff, in the subject referred to, it was held that the existence of facts constituting such a privilege, if found by the jury, under suitable instructions, would exonerate the defendant unless it should appear, from unnecessary publicity in the utterance or otherwise, that he was prompted by actual malice.

At the second trial the plaintiff offered twenty prayers and the defendant five. Of the plaintiff's prayers the 2nd, 7th, 9th, 11th and 15th were granted. The 1st, 3rd, 4th, 5th, 6th, 13th, 14th, 16th, 17th, 18th, 19th and 20th prayers of the plaintiff disregarded the theory that actual malice must be found, to justify recovery, if the occasion was privileged, and they were, therefore, properly rejected. The 8th, 10th and 12th instructions asked by the plaintiff were covered in principle by his granted prayers.

The defendant's 1st and 6th prayers were refused. His

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2nd, 3rd and 5th prayers, which were granted, correctly submitted the case to the jury upon the theory of the defence. The 4th prayer of the defendant, which also was granted, instructed the jury in substance, that if the plaintiff agreed to haul out and sell the mortgaged corn and pay the proceeds to the defendant to be applied on the plaintiff's indebtedness, and the plaintiff failed to make such payment, and before the occasion of the alleged slander the defendant learned that the plaintiff had sold two loads of the corn under an agreement, made without the defendant's knowledge, that the price should be credited on a debt the plaintiff owed the purchaser, then the defendant was justified in believing the plaintiff guilty of a crime and the verdict should be in the defendant's favor. This prayer was defective in ignoring the theory that if the defendant was actuated by express malice, he would not be relieved of liability on the ground that the communication was privileged. The evidence which, on the former appeal, was held legally sufficient to be submitted to the jury on the question of actual malice, is again before us in the present record. This feature of the case was left out of consideration altogether by the defendant's fourth prayer, and, in the event of a finding of the facts to which it alluded, and which were practically conceded, it directed a verdict for the defendant regardless of the material inquiry we have indicated. In the defendant's second prayer the issue as to the existence of express malice was distinctly submitted, but its omission from the 4th prayer made the instructions inconsistent to that extent and liable to cause misapprehension in the minds of the jury.

It is unfortunate that this case, which has already been tried twice, should have to be remanded for another trial, but we are unable to avoid that result as we could not reasonably hold that the appellant was not prejudiced by the rulings we have found to be erroneous.

*Judgment reversed, with costs, and new trial awarded.*

JAMES F. THRIFT, COMPTROLLER,

vs.

ALBERT G. TOWERS.

*Acts of the Legislature: passage; amendment. Presumptions:  
not to be impeached by Journals alone. Reading of title.*

The amendment of a bill, by striking out all after the words "A Bill," and substituting or inserting in lieu thereof an entire new bill, is in accordance with universal legislative procedure, and is not in conflict with section 27 of Article 3 of the Constitution. p. 58

When a bill is properly authenticated, it can not be impeached by the Journals alone, or by oral testimony that some provision of the Constitution was not observed in its passage. p. 61

There is no constitutional provision requiring the title of a bill to be endorsed upon the back of a bill; and where the *original* title of a bill was endorsed upon the back of a new bill, which by amendment had been substituted for the original bill, this is not sufficient to authorize the presumption that in the reading of the bill as it was in process of being passed by the Legislature, the proper title was not read. p. 60

*Decided November 11th, 1915.*

Appeal from the Superior Court of Baltimore City.  
(DUFFY, J.)

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The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*S. S. Field, the City Solicitor for Baltimore City, for the appellant.*

*W. Cabell Bruce, for the appellee.*

BURKE, J., delivered the opinion of the Court.

The appellee, Albert G. Towers, was appointed on May the 4th, 1914, a member of the Public Service Commission of Maryland for the term of six years, and on the same day qualified and entered immediately upon the discharge of his duties as such commissioner. Under the Act of 1914, Chapter 750, as printed in the Public Laws of 1914, there became due him by the Mayor and City Council of Baltimore the sum of \$240.62 for services rendered as a member of the Public Service Commission between May 4, 1914, and August 1, 1914. He made application to James F. Thrift, the Comptroller of Baltimore City, for a warrant upon the City Register for the payment of the sum claimed to be due. Mr. Thrift declined to issue the warrant, having been advised that the Act under which the claim was made was invalid. On the 23rd of February, 1914, the appellee filed a petition for a mandamus against the Comptroller in the Superior Court of Baltimore City to compel the payment of the money claimed. The trial, upon the issues joined upon the pleadings in the case, resulted in an order of that Court dated April 19th, 1915, directing a writ of mandamus to issue against the Comptroller commanding him to draw his warrant, or to give his approval to the City Register for the pay-

ment to the petitioner, out of the treasury of the Mayor and City Council of Baltimore, for the sum of \$240.62, being the amount claimed in the petition. The appeal before us was taken by the Comptroller from that order.

The single question in the case is the validity *vel non* of the Act of 1914, Chapter 750. While the answer assailed the Act upon a number of grounds, one of these only will be considered for the reason that all the other objections were set up and decided adversely to the appellant in the case of *Thrift v. Laird, Comptroller*, 125 Md. 55.

The Act of 1914, Chapter 750, is entitled:

"AN ACT to repeal and re-enact with amendments, that portion of section 2 of Chapter 180 of the Acts of the General Assembly of Maryland of the year 1910, relating to the compensation of the members of a public service commission."

The Act contains three sections, and the first section is here transcribed as it appears in the printed volume of the Laws of 1914:

"*Be it enacted by the General Assembly of Maryland*, That all that portion of section 2 of Chapter 180 of the Acts of the General Assembly of Maryland of the year 1910, reading as follows: 'The salary of each of said Commissioners shall be three thousand dollars (\$3,000) per annum, payable out of the State Treasury by the State of Maryland; and in addition to said sum of three thousand dollars per annum, the Chairman of said Commission shall also receive the sum of three thousand dollars per annum, which shall be paid out of its funds by the Mayor and City Council of Baltimore to said Chairman of said Commission as an employee of said municipal corporation; and each of the other two Commissioners shall receive, in addition to said three thousand dollars per annum aforesaid, the sum of two thousand dollars (\$2,000) per annum, which shall be paid out of its funds by the

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Mayor and City Council of Baltimore to each of said other two Commissioners as employees of said municipal corporation,' be and the same is hereby repealed and re-enacted with amendments so as to read as follows: 'The salary of each of said Commissioners shall be three thousand dollars (\$3,000) per annum, payable out of the State Treasury of the State of Maryland; and in addition to said sum of three thousand dollars per annum, each of said Commissioners shall also receive the sum of three thousand dollars (\$3,000) per annum, which shall be paid out of the funds by the Mayor and City Council of Baltimore to the members of said Commission as employees of said municipal corporation.' "

This Act, as printed, is free of all constitutional objection, and if it was actually passed as printed, we must, adhering to our decision in the case of *Thrift v. Laird, supra*, affirm the order appealed from, because the sole ground upon which the payment of the money is resisted is the alleged unconstitutionality of the Act. Before stating and considering the single objection which we regard as open for decision on this appeal, a statement of the legislative history of the bill will be given.

On February 17, 1914, Mr. Mudd introduced into the Senate a bill entitled "An Act to amend Article 23 of the Code of 1912 of Public General Laws of Maryland, titled 'Corporations,' sub-titled 'Public Service Commission,' by adding a new section to follow section 462 and to be known as section 462-A, the same providing for the forfeiture of corporate rights, powers and franchises upon failure to comply with certain orders of the commission requiring adequacy of public service."

The bill was then numbered Senate Bill No. 287, and this number and the exact title, as above transcribed, was entered upon the Senate Journal. The bill was then read the first time, and referred to the Committee on Judicial Proceed-

ings. Nothing further appears to have been done with respect to this bill until March 31, 1914. On that date Mr. Benson, from the Committee on Judicial Proceedings, reported the bill favorably with amendments. The bill was reported by its original title. The amendment proposed by the Committee was this: "Amend by striking out all after the word 'A Bill,' and insert in lieu thereof the following." The amendment as proposed by the committee appears at large in Volume 2, page 265, of the Senate Journal, and is identical in title and contents with the Act of 1914, Chapter 750, as printed. The report was laid over under the rules, but on the same day, upon motion of Mr. Cooper and by the vote of 27 senators, the rules were suspended, and the bill put upon its second reading. The proposed amendment and the favorable report were adopted, and the amended bill was read the second time and ordered to be printed for a third reading. The effect of the amendment was the substitution of an entire new bill for the bill introduced by Mr. Mudd on February 17, 1914. This method of substituting by amendment an entire new bill is in accordance with universal legislative procedure, and is supported by high authority (*vide* Jefferson's Manual Section XXV, pg. 75), and it is not seriously contended that it violates section 27, Article 3, of the Constitution.

The bill was printed as amended, for a third reading, that is to say, precisely as it now appears in the published laws of 1914, and in addition thereto, there was printed, on the outside of one of the pages or wrappers, the title of the original bill with endorsements thereon, made by the secretary of the Senate before the amended bill was sent to the printer.

It should be stated in this connection that while the amendment proposed by the Committee on Judicial Proceedings was spread upon the Journal of the Senate, and that when the amended bill passed its first and second readings in the Senate it was indicated upon the Journals of the Senate and House through every stage of its legislative

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progress simply by the title which it bore at the time of its introduction in the Senate, with nothing appearing on the Journal of the House to indicate the amendment.

On April 2nd, 1914—three days after the amended bill had been ordered printed for a third reading—the Senate Journal contains this entry:

“Senate bill, No. 287, entitled ‘An Act to amend Article 23 of the Code of 1912 of Public General Laws of Maryland, title “Corporations,” a sub-title “Public Service Commission,” by adding a new section to follow section 462 and to be known as section 462A, the same providing for the forfeiture of corporate rights, powers and franchises upon failure to comply with certain orders of the Commission requiring adequacy of public service.’ Which was read the third time and passed by yeas and nays.”

Twenty-six senators voting in the affirmative and none in the negative. The bill was then sent to the House of Delegates bearing on the outside page the original title and endorsed: “Read the third time and passed by yeas and nays.” The Journal of the House, as before stated, referred to the bill by its original title, and shows that the bill was received by the House on April 3rd, 1914, and was read the first time on that day, and referred to the Committee on Judiciary, which made a favorable report thereon on April 4th, and that the report was adopted, and that the bill was read the second time on April 4th, 1914. On April 6th, 1914, the bill, to which the Journal refers as Senate bill No. 287 and which was designated by its original title, was read a third time and passed by yeas and nays,—70 members voting in the affirmative and none in the negative. The bill was signed by the Governor on April 13th, 1914.

Upon these facts the appellant contends that the Act is invalid, because the title of the Act as printed is not the title which the bill carried through every stage of its passage in both Houses, and which still appears on the printed Act

signed by the Governor and in the custody of the Clerk of the Court of Appeals; that in all its readings in the Senate and House and in its final passage in each branch of the General Assembly it was read and passed by its original title, that is to say, with the same title it bore when introduced by Mr. Mudd on February 17, 1914. If this contention be established the Act must be declared void, because under such a title no act could be validly passed repealing and re-enacting a portion of section 2, Chapter 180 of the Act of 1910 (p. 342), and increasing the salaries of members of the Public Service Commission. Such attempted legislation, under such a title, by all the authorities, would be a clear violation of section 29, Article 3 of the Constitution. The endorsements on the bill and the Journal entries in both houses show the passage of some bill, and the one signed by the Governor is the bill attacked in this case. The amended bill, complete in itself, was before both houses, although it had attached to it on the wrapper the original title and the endorsements made before amendment. There is no evidence to show the original title was read after the amendment was adopted. The Journals do not so show. It was merely referred to by the original title. The bill was amended and passed its third reading in the Senate three days after the amendment, which was entered at large on the Senate Journal. The Senate was aware of its action, and with this knowledge are we to refer the entry as to the reading of the amended bill, which had a complete title and a complete text, to the *original* title and not to the *new* and *amended* title? Such a holding would be unreasonable, and would impute to the Senate ignorance of its own proceedings. There is no requirement of the constitution that the title shall appear on the back of the bill, and, if it be conceded, that the bill was possibly or probably read in the House by its original title, this would not be sufficient to justify the Court in declaring it void. When a bill is properly authenticated it cannot be impeached by the Journals alone, or by oral testimony that some provision of

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the constitution was not observed in its passage, and certainly the inference that the bill was read by its original title drawn from the fact that the printer by mistake or inadvertence printed the original title on the back of the amended bill is not sufficient to justify the Court in striking the Act down. To establish his position the appellant was bound to show by competent and clear evidence that the original title *alone* was read. Mere inferences, possibilities, and probabilities will not do. The ground of the attack must be plainly and clearly established. The rule which holds that a duly authenticated and published Act is presumed to have been validly passed, and that this presumption cannot be rebutted unless it appears by clear and competent evidence that some requirement of the constitution has been disregarded in the passage of the bill rests upon sound principles of reason and public policy. In dealing with the question here presented it must "be borne in mind that there is a wide distinction between taking up an act which has been passed by the Legislature, comparing it with the constitution, and declaring whether its provisions are in accord with that instrument or not, and looking into the details of the method of procedure by the legislative bodies in passing the act and the regularity of the steps which they took in so doing. The Court declares the law. If there are two statutes in apparent conflict the Court must determine which is the controlling one, or the existing law. If a statute and a provision of the constitution are set up as being in conflict with each other, the Court must compare the two and determine if such a conflict in fact exists, and, if so, that the constitution must prevail. But this is not the same thing as going into the details of legislative procedure, critically examining the methods of a co-ordinate department of the government, and declaring that its members have failed or refused to obey constitutional directions or commands as to the manner in which they should perform their duties, because of an entry, or the absence of an entry, on the journal kept by some clerk or subordinate employee.

The latter proceeding is at best a matter of delicacy, and not to be indulged in by the Courts unless plainly required by the constitution. The Legislature is one of the three departments of the government. Its members and officers are sworn to support the constitution; and in discharge of their duties they are acting under oath. Where the constitution directs or commands them to take certain steps in a certain way, or not to enact a law without some prescribed antecedent procedure, their oath includes the obligation to enact the measure in the constitutional manner, or not to enact it without the happening of the constitutional event thus provided. In the imperfection of all human institutions, legislatures may sometimes, through inadvertence or even through design, violate the constitution, but the courts will not lightly conclude that they have intentionally or unintentionally violated rules of conduct laid down for them by the constitution in the transaction of their business. The clerical officials who keep the legislative journals must necessarily do so in the haste and pressure of business; and memoranda, often hurriedly made, must be relied on by them. Assistants and subordinates are employed to aid them. As between the question whether the president of the Senate and the speaker of the House, aided by the enrollment committees, all of whom are charged with the duty of seeing that the constitutional rules are enforced, have, through incompetence or corruption, violated that duty, and signed and sent to the Governor an act which had not in fact been passed in the constitutional manner, and that the Governor, who is also sworn to obey the constitution, has likewise inadvertently or unintentionally approved an act which has not been lawfully passed, or, on the other hand, that some journalizing clerk or assistant has made a mistake in the preparation of the journal, courts will be more ready to adopt the latter theory than the former." *DeLoach et al. v. Newton*, 134 Ga. 739.

The Maryland rule upon this question has been stated in the cases of *Fouke v. Fleming*, 13 Md. 392; *Berry v. Drum Point Railroad Co.*, 41 Md. 463; *Fidelity Warehouse Co. v.*

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*Canton Lumber Co.*, 118 Md. 135; *Ridgely v. Baltimore City*, 119 Md. 567 and *Jessop v. Mayor and City Council*, 121 Md. 562. In *Berry v. Drum Point Railroad Co.*, *supra*, the Court said: "Unquestionably, where an Act has been duly authenticated and published as law by authority, the presumption is, that all the constitutional solemnities and prerequisites necessary to its valid enactment have been complied with; and this presumption exists until the contrary is clearly made to appear. But when it can be made clearly to appear, as in this case it has been, that the particular bill or section of a bill, although it may have all the forms of authentication, has never in fact received the legislative assent, we think the Court is bound to look not only behind the printed statute book, but beyond the forms of authentication of the bill as recorded in the office of this Court, and if the evidence be clear and entirely satisfactory to the mind of the Court, to decide accordingly."

The learned City Solicitor presented his contention with great earnestness and ability but we do not find that it is supported by the character of evidence required by the law of this State, and, therefore, we must affirm the judgment.

*Judgment affirmed, the appellant to pay  
the costs.*

THE IMPERVIOUS PRODUCTS COMPANY,  
A CORPORATION,  
*vs.*  
H. EMORY GRAY.

*Set-off and recoupment. Res adjudicata. Uniform Sales Act: remedies under—; rights of plaintiff; election.*

The plea of set-off is of purely statutory creation and is limited to *mutual debts*, of the same kind or quality, and which are certain, and clearly ascertained, or liquidated. p. 67

In an action of assumpsit, the defendant, under the general issue plea, may show injury to him by the plaintiff, on which to found claim for recoupment. p. 67

Under the statute, under a plea of set-off, a defendant who has proved the items or accounts which go to establish the plea, may recover a judgment against the plaintiff for any sum that the proof shows the plaintiff owes him, over and above the amount of plaintiff's claim. pp. 67-68

But in recoupment, while the defendant may show damages, equal to the whole or part of the plaintiff's claim, and have it deducted therefrom, he can not recover any affirmative judgment against the plaintiff. p. 68

Under the Uniform Sales Act, where, upon a breach of warranty of goods sold, if the plaintiff resorts to one of the distinct courses therein provided for, no other remedy is thereafter to be granted him. p. 69

A verdict and judgment upon the merits in a former suit, is in a subsequent suit between the same parties, where the cause of action, damages or demand is the same, conclusive against the plaintiff's right to recover, whether pleaded in bar or given in evidence under the general issue, and such prior verdict and judgment need not be pleaded by way of estoppel. pp. 68-69

*Decided November 11th, 1915.*

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Opinion of the Court.

Appeal from the Superior Court of Baltimore City.  
(SOPER, C. J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE,  
PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Julius H. Wyman* and *Jacob S. New*, for the appellant.

*Ridgely P. Melvin* (with whom was *W. Thomas Kemp*  
on the brief), for the appellee.

STOCKBRIDGE, J., delivered the opinion of the Court.

In the year 1911, H. Emory Gray entered into a contract with the State Roads Commission for the construction of a road on Patapsco street, between First street and Pennington avenue, Brooklyn, Anne Arundel County. For the execution of that contract Mr. Gray, among other materials, had occasion to purchase a preparation known as binder, and in the month of September agreed with the Impervious Products Company for the supply of it, which he would need in the construction of the road under his contract. The terms of that agreement were as follows:

“September —, 1911.

“H. E. Gray, Esq.,

“Brooklyn, Md.

“Dear Sir—We agree to furnish you with Fairfield Binder No. 5 hot at our plant at 9c. per gallon, and guarantee same to comply with the State’s specification.

“Yours very truly,

“Impervious Products Co.”

A portion of the binder thus contracted for was furnished to Mr. Gray by the Impervious Products Co. in the fall of 1911, and it appears to have fully met the requirements of Mr. Gray’s contract with the State Roads Commission. Dur-

ing the winter the work under Mr. Gray's contract was suspended, but with the opening of the spring of 1912 it was resumed, the binder being furnished as before by the Impervious Products Co., but at this time the binder failed to prove satisfactory, and was condemned by the State Inspector, and a portion of the road which had been built by Mr. Gray during that spring was required to be rebuilt. Where Mr. Gray obtained the binder for the rebuilding does not clearly appear in the record, but apparently from some source other than the Impervious Products Co.

In April, 1913, the Impervious Products Co. instituted suit against Mr. Gray for the sum of \$345.60, as the purchase money due for binder furnished between June 17th and June 21st, 1912. To this suit Mr. Gray filed the general issue pleas, and a plea in set off, worded as follows:

"That the plaintiff is indebted to the defendant in an amount greater than the plaintiff's claim \* \* \* and the defendant claims \$600, which amount except for excess claimed by defendant he is willing to set-off against the plaintiff's claim."

Then followed a bill of particulars of the defendant's claim, amounting to \$440.05. Upon these pleadings that case went to trial, and after evidence taken and instructions given by the Court, resulted in a verdict for the defendant.

In 1914 the present suit was instituted by Mr. Gray to recover as damages \$334.20, and in this suit the plaintiff and present appellee filed a bill of particulars identical with that filed with his plea of set off in the previous suit, except that in this account the labor was charged at 15c. an hour, instead of 20c. an hour, as in the first suit.

Numerous exceptions were taken during the trial of this case, all of which, however, revolve around the question whether Mr. Gray was estopped from maintaining the second suit, by reason of the earlier one, and a determination of whether the first suit amounted to *res adjudicata*.

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The first suit was in assumpsit for goods sold and delivered. To this suit a plea of set off, where the nature of the set off claimed was an unliquidated damage, was an improper plea. *Westminster Co. v. Coffmann*, 123 Md. 619. The plea of set off is a defense of purely statutory creation and is limited to mutual debts; to make a plea of set off good the debts must be mutual, must be of the same kind or quality, and be certain and clearly ascertained or liquidated. 1 *Poe on Pleading*, section 613.

That the claim of Mr. Gray in the first suit was one in the nature of a claim for damages for non-compliance with the provisions of the contract hereinbefore set out, is perfectly clear, both from the two bills of particulars filed in the respective cases and from the testimony of Mr. Gray himself. But while the plea of set off and evidence given in the first suit could not have been sustained as or under a plea of set off, the evidence was entirely proper to be given under the general issue pleas filed, because it tended to show a right to recoup on the part of Mr. Gray. Numerous cases in this State have sustained the doctrine that a defendant may in an action of assumpsit under a general issue plea, show injury on which to found a claim for recoupment. *Doggett v. Tat-ham*, 116 Md. 147; *Rawlings v. Nash*, 117 Md. 393; *Sullivan v. Boswell*, 122 Md. 539.

The appellee has strongly urged that the plea of set off having been an improper one, he is not now precluded from setting up his claim of damages, and relies for this on the case of *Davidson Chemical Co. v. Miller*, 122 Md. 140. In that case, however, while a plea of set off had been filed, the plea was subsequently withdrawn and the issue was not presented to the jury. In the present case the plea of set off never was withdrawn, and the rejection of the defendant's second prayer in the first suit by no means shows that the claim of the defendant was not submitted to the jury in that case. That prayer as offered was defective for a very patent reason. Under the statute in this State, where a defendant has pleaded a set off, and has proved the items or account

which go to make up his set off, the defendant can recover a judgment against the plaintiff for such sum as the proof may show the plaintiff to be indebted to him, over and above the amount of the plaintiff's claim. In recoupment a defendant may show damages equal to some part or the whole of the plaintiff's claim, and have it deducted from that claim; but can recover no affirmative judgment. The defendant's second prayer, if granted, would have instructed the jury that they might in a matter of recoupment find an affirmative verdict in damages for the defendant, and for this reason was fatally defective. 1 *Poe on Pleading*, sections, 515, 516; *Beall v. Pearre*, 12 Md. 550; *Harman v. Bannon*, 71 Md. 428; *Eureka Fertz. Co. v. Balto. C. S. & R. Co.*, 78 Md. 189.

It has already been pointed out that the bill of particulars filed by the defendant in the first suit was practically the same as the bill of particulars filed by him as plaintiff in the present suit, and his testimony in the present case shows that the claim now made was the same claim as was made in that suit. As early as the case of *Shafer v. Stonebraker*, 4 G. & J. 355, JUDGE DORSEY said: "The plea of not guilty (which on the first trial had been the general issue plea), put in issue not only every material fact contained in the declaration, but every defense admissible in evidence under such plea of which the defendant should offer testimony."

The evidence on the first trial being, as has been recited, and the verdict of the jury having been, in favor of the defendant, there is no possibility of avoiding the conclusion that what the jury in fact found in that case was that Mr. Gray had suffered a damage which he was entitled to recoup to the extent of the whole of the then plaintiff's claim. Such being the case the language of this Court in the case of *Beall v. Pearre*, 12 Md. 550, becomes peculiarly apposite: "A verdict and judgment upon the merits in a former suit, is in a subsequent suit between the same parties, where the cause of action, damages or demand is the same, conclusive against the plaintiff's right to recover whether pleaded in bar or given in evidence under the general issue, and such prior

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verdict and judgment need not be pleaded by way of estoppel."

The doctrine thus laid down has been uniformly followed in this State, of which the following cases are but examples: *Whitehurst v. Rogers*, 38 Md. 515; *Oursler v. B. & O. R. R. Co.*, 60 Md. 358; *Trayhern v. Colburn*, 66 Md. 279; *Brooke v. Gregg*, 89 Md. 234.

In this condition of the law it was error in the trial court to have refused the defendant's second prayer, and that of course made the granting of the two prayers of the plaintiff also erroneous.

Most of the exceptions reserved upon questions of evidence during the course of the trial related to evidence tending to show the nature of the prior litigation between the parties, and in so far as those rulings bore upon that aspect of the case, they were tinged with the same error.

In the brief of the appellant considerable space was devoted to showing that this case fell within the provisions of the Uniform Sales Act, section 90 of Article 83 of the Code. It is undoubtedly true, as contended by the appellant, that if the letter of the Impervious Products Co. of September, 1911, constituted a warranty of the goods sold, and there was any breach of that warranty, then the buyer had four distinct courses open to him, as set out in the Act; but that after having resorted to and adopted one of these courses no other remedy could thereafter be granted to him. Undoubtedly by giving evidence in the way of recoupment in the first suit, the present appellee made his election, and having so elected was bound by it, and could thereafter have no other or further remedy. But upon either ground, that of election of a defense under the Uniform Sales Act or that of *res adjudicata*, the result is the same, and the judgment below must be reversed.

*Judgment reversed without a new trial, appellee to pay the costs.*

STEWART TAXI-SERVICE COMPANY, A BODY  
CORPORATE,

vs.

BASIL ROY.

*Evidence: conflict; question for jury. Appeals: prayers.*

Where the evidence is conflicting and irreconcilable, the case is one for the consideration of the jury. p. 77

An objection to a granted prayer can not be considered on appeal, unless a special exception, relying upon the alleged defect in the prayer, appears by the record to have been taken below. p. 79

There is a reasonable presumption that a person driving a team or taxicab is the agent or servant of the owner, unless it be shown that the contrary was the fact. p. 76

Whether the proof offered is sufficient to rebut the presumption of agency is a question for the jury. p. 76

*Decided November 11th, 1915.*

Appeal from the Court of Common Pleas of Baltimore City. (DAWKINS, J.)

The facts are stated in the opinion of the Court.

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Opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Arthur L. Jackson*, for the appellant.

*John B. Gontrum* (with whom were *Henry B. Mann* and *John S. Biddison* on the brief), for the appellee.

BURKE, J., delivered the opinion of the Court.

This suit was instituted by the appellee, Basil Roy, against the Stewart Taxi-Service Company, a body corporate, to recover damages for injuries to himself, which were sustained in consequence of the alleged negligence of the servant or agent of the defendant in driving an automobile against and over him. The injuries are alleged to have been sustained on the 19th of September, 1914, while the appellee was walking along Eastern avenue, a public highway of Baltimore County. The declaration contained two counts. The first count alleged that the appellee was using proper care and caution in walking upon said highway; that while so walking "an automobile, owned by the said Stewart Taxi-Service Company was negligently and unskillfully, and without the exercise of due care and caution operated or driven by one of the agents, employees, or servants of the said defendant on Eastern avenue road, near Prospect Park aforesaid mentioned; and that by reason of said negligence and unskillfulness and want of ordinary care and caution on the part of said defendant, its agent, servant, or employee, the said automobile was driven or run against and struck and injured the plaintiff as he was then and there walking along and on said Eastern avenue road and using all due and ordinary care and caution, whereby the said plaintiff was greatly injured and disabled and his ankle broken; and the plaintiff as a result of said injuries, suffered great physical pain and

distress and mental anguish and suffered great financial loss and damage; and said injuries were caused by the negligence and absence of due care and caution on the part of the defendant, his agent, servant, and employee, and not by reason of any want of due care and caution on the part of the plaintiff thereto contributing." The second count alleged that the injuries sustained were permanent, but in other respects it was like the first. The defendant pleaded that he did not commit the wrongs alleged, and issue was joined upon this plea. A jury was sworn, and after a trial a verdict was rendered against the defendant, and, after a motion for a new trial had been overruled, a judgment was entered upon the verdict, and from that judgment the defendant appealed.

It is unnecessary to the decision of the legal questions raised to discuss with particularity the evidence contained in the record. It is most conflicting and utterly irreconcilable. The main facts upon which the plaintiff relied are these: that a little after midnight on the 19th of September, 1914, he was walking on the Eastern avenue road towards his home; that he was on the right side of the road near the gutter; when he had reached a dark place in the road he heard the noise of a machine; he turned around but saw no light and heard no horn blow, and he concluded that the machine was not coming towards him; he then turned to continue his journey and as he turned he was struck by the machine; he was near the ditch on the side of the road, and was knocked into the ditch by the machine; that the machine ran over him and one of his feet was caught in the right hind wheel; that he extricated it with much difficulty and pain; that he was helped to his house by the men in the machine; that a physician was called, and he was found to be severely and painfully injured, and was confined to his bed for two weeks; that there were no lights upon the machine; that the men wanted to leave him in the road but he begged them to take him to his home. The plaintiff's testimony was corroborated in many important particulars, especially his state-

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ment that the place where he was struck was dark and that the machine had no lights. He was attended by Dr. France for two weeks, and was taken to a hospital where an X-ray picture was taken of his foot. He was bruised and lacerated; his shoulder was injured and one ankle was fractured. The plaintiff testified that his shoulder was "all right now" but that he still suffered from his ankle. Dr. France, the attending physician, described the plaintiff's injuries. He said: "Mr. Roy had a lacerated face and apparently a dislocated shoulder," and the witness thought at that time there was a fracture of the ankle joint; later he found there was such fracture; that he found the plaintiff suffering severely from shock, under excitement, and very considerably depressed. That he attended him for about two weeks, and Mr. Roy called at the office after that, but just when and how long before he stopped going to see him he could not recall. That it took about two weeks for the external injuries to be treated first for the lacerations to heal sufficiently to put pressure on them to approximate the joint. After the picture was taken we found the fracture of the internal bone of the ankle joint; that is usually caused by direct violence."

He further gave some testimony, to which we will presently refer and to which exceptions were taken, tending to show that the injuries were permanent. It was admitted that the machine was owned by the defendant, and it was shown in the testimony offered on behalf of the plaintiff that it was driven at the time the plaintiff was injured by William J. Ennis. There is no evidence to show and it is not contended that the plaintiff was guilty of contributory negligence. The defense relied upon was: *first*, that the plaintiff was not injured by the defendant's car. That he did not strike him. This was testified to by Ennis, the driver, and by the witness Casey. They testified that as they approached a certain point on the highway, they saw an object in the road some little distance ahead; that they stopped the car and found the plaintiff lying in the road; that he was moan-

ing, and said his leg was broken, and, at his request, they took him home. Casey said that when they found the plaintiff "his face was dirty and wet and bloody, and his clothes were dirty, he was messed up in general." Both of these witnesses said the lights on the front of the car were burning; and testimony to this effect was given by another witness. *Secondly*, that Ennis, who was driving the car, was not the agent or servant of the defendant, and therefore, if it be conceded that the plaintiff was struck as alleged in the declaration, the defendant could not be held liable.

It may be well at this point to refer to the testimony offered on the part of the defendant as to how Ennis came into the possession of the car. Ennis was an employee of the Fisk Rubber Company. He had never been in the employ of the defendant. Under a contract between the Fisk Rubber Company and the defendant he was "employed by the Fisk Rubber Company as inspector of automobile tires for the Stewart Taxi-Service Company, and also of mileage meters, and to see that the running gears on all these cabs will run properly in order to give the best mileage that can be got out of those tires." He testified that the engine of the cab had been overhauled, and at the request of Mr. Cassidy, then and now an employee of the defendant, but who was not called as a witness, he took the cab out to test it for him; that he ran it around a city block, and in company with Casey he went out the Belair road for some distance. They came back to Baltimore, and went down Eastern avenue as far as Prospect Park where he was compelled to do some repair work to the car. He said, "it takes 100 miles to run an engine before you get it right when you have overhauled it. If you take it out of the shop, and give it to a chauffeur before you have tried it you will have to send somebody out to take it home." Asked what his purpose was in taking the cab out, the witness said: "I have had quite a lot of experience with automobiles, and Mr. Stewart seemed to be a little busy, and Mr. Cassidy, his office man, asked me if I

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would take it out and test it for him, as my time had finished with the Fisk Rubber Company twelve o'clock noon." He had tested cabs out for Mr. Cassiday as often as once a month.

Harry L. Stewart was the general manager of the defendant company. He said it was his duty to look after the business generally, and to keep a watch on everything; that there was no other person in active charge of the business. That Mr. Cassiday had been in the employ of the Company ever since it was organized; that he was employed in the capacity of starter, and that he had no authority to send out cabs in the control of anyone except the employees of the company; he denied that he had known that Cassiday had sent this car out on the night in question, but he did not deny that he had knowledge that Cassiday had permitted Ennis to take cars out on other occasions as testified to by him.

We have no doubt that the evidence offered on the part of the plaintiff was sufficient to have taken the case to the jury, and if believed by them to have warranted a verdict for the plaintiff. If that evidence be true, Ennis was unquestionably guilty of actionable negligence. This proposition is evident, and is fully supported by section 149, Article 56 of the Code, and by the case of *Fletcher v. Dixon*, 107 Md. 420, and the recent case of *Biogini v. Steynen*, 124 Md. 369. It was also sufficient to have justified the jury in finding that Ennis was the servant of the defendant. The cab was owned by the defendant and Ennis was operating it. These facts made out a *prima facie* case in support of the allegation that the machine was operated by the defendant's agent or servant. In the case of *Vonderhorst Brewing Co. v. Amrhine*, 98 Md. 406, JUDGE MCSHERRY said: "There is evidence in the record showing that the wagon which collided with the plaintiff was owned by the Vonderhorst Brewing Company. And there is also evidence, adduced by the defendants, that the wagon which ran into the plaintiff's team had on it the name of the Vonderhorst Brewing Com-

pany. These facts were sufficient to justify the jury in concluding that the driver of the wagon was the agent of the owner of the wagon. That proposition was expressly sustained by LORD CHIEF JUSTICE DENMAN in the case of *Joyce v. Capel and Slaughter*, 8 Car. & Pay, 370. It was there held that in an action for damages done to the plaintiff's lug-boat by the negligence of the defendant's servant in steering the defendant's barge, when it was proved that the barge was the defendant's but the plaintiff's witnesses could not identify the barge-man who was steering the barge, that this was *prima facie* evidence that the barge was steered by the defendants' servant, and that if the barge was on hire or was taken by any other person, it lay on the defendants to show that. And so in the case of *Edgeworth v. Wood*, 58 N. J. L. 463, s. c. 33 Atl. Rep. 940, following the decision of LORD DENMAN, it appearing in an action against an express company for negligence in running over the plaintiff by a wagon drawn by two horses, that the wagon was painted in a peculiar manner and marked with the name of the express company and a peculiar device used by it; the Supreme Court of New Jersey held that the evidence that the wagon which ran over the plaintiff was so painted and marked, was sufficient to justify the inference that the defendant express company was its owner, and that such inference established *prima facie* that the company was in possession and control of the wagon by the driver as its servant. Other cases to the same effect might be cited but it is not deemed necessary to allude to them because the proposition is quite self-evident. It is a reasonable presumption that a person driving the team of another is the agent or servant of the owner of the team, unless it is shown by the owner of the team that the contrary is the fact." It is supposed that this plain statement of the law has been limited or modified by the cases of *Steinman v. The Laundry Co.*, 109 Md. 62, and *Symington v. Sipes*, 121 Md. 313. Those cases rest upon an entirely different principle, and the Vonderhorst case was not re-

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ferred to in either of them. The facts were entirely dissimilar. In the first of those cases the Court held that upon the evidence produced by the plaintiff the agent of the laundry company was acting beyond the scope of his authority, and in the latter case JUDGE URNER, after stating the facts, which have not the remotest analogy to the facts of this case, said: "Upon the facts we have recited, as to which there is no dispute, we have no hesitation in deciding, as a matter of law, that the appellant is not liable in this action, and that the instruction he proposed to that effect should have been granted. The proof makes it perfectly clear that even if the chauffeur be regarded as the servant of the appellant rather than of his brother, during the period in question, he was not at the time of the collision acting within the scope of his employment, but was using the automobile contrary to the express orders to which he was then subject and exclusively for his own individual purposes. The decisions are unanimous in holding that under such circumstances the servant is solely responsible for the consequences of his negligence."

The evidence offered by the defendant to show that Cassidy had no authority to send the machine out to be tested is not of such a character as to have warranted the Court, under the circumstances of this case, in deciding that Ennis was not the defendant's agent. That question was properly left to the jury under the facts in evidence. *Brager v. Levy*, 122 Md. 554, and cases cited in the opinion in that case.

We now pass to the consideration of the prayers granted at the conclusion of the whole case. The Court granted the plaintiff's first, second and third prayers. The third prayer was the usual one on the measure of damages. The first and second prayers were granted in connection with the defendant's sixth prayer as modified by the Court. This modified prayer and the first and second prayers of the plaintiff are here set out:

*Plaintiff's 1st Prayer.*—The plaintiff prays the Court to instruct the jury that if they find from the evidence that on

or about the nineteenth day of September, 1914, the plaintiff was injured by the automobile or taxicab of the defendant, while operated by the agent or servant of the defendant, on the Eastern avenue road, a public thoroughfare of Baltimore County, near a place known as Prospect Park, if the jury so find, and the plaintiff's injury resulted directly from the want of ordinary care and prudence on the part of the defendant, its agent or servant, and not from the want of ordinary care and prudence on the part of the plaintiff directly contributing to the accident, then the plaintiff is entitled to a judgment.

*Plaintiff's 2nd Prayer.*—The plaintiff prays the Court to instruct the jury that even if the jury believe that the plaintiff was guilty of the want of ordinary care and prudence while walking upon Eastern avenue, under the circumstances testified to before them; yet if the jury further find that if the defendant's servant or agent had used in and about the running, operating or management of the automobile that injured the plaintiff, ordinary prudence and care in the running, operating or management thereof, and in keeping a reasonable lookout and in having lights on the automobile burning the said accident could not have occurred, then the plaintiff is entitled to recover, provided they find the other facts set out in the first instruction granted to the plaintiff.

*Defendant's Modified 6th Prayer.*—The jury are instructed that if they find from all the evidence in this case that at the time of the happening of the accident mentioned in the testimony, the defendant's taxicab was then operated by one William J. Ennis, and shall further find that at the time of the happening of said accident the said William J. Ennis was not operating said taxicab for the defendant company and if the jury further find that the said Ennis was not acting as its agent and servant within the scope of his employment, then the verdict of the jury must be for the defendant."

The defendant's fourth prayer, which told the jury they

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must find for the defendant if from all the testimony they find that the taxicab did not strike the plaintiff, was granted.

It follows from what we have said that the defendant's first, second and third prayers, which sought to withdraw the case from the jury, were properly refused, and that the special exceptions to the plaintiff's first and second prayer were properly overruled. There was no evidence in the case to support the theory of the defendant's fifth prayer, and the Court was right in rejecting it. We find no error in the modification of the defendant's sixth prayer, and upon a review of the whole record we are of opinion that the case was fairly submitted to the jury under the granted prayers.

The record contains a number of exceptions to testimony, all, except one, were taken to the testimony of Dr. France, relating to the extent of the plaintiff's injuries. We do not think it necessary to discuss these several exceptions. We have given them due consideration, and find no reversible error in any of them.

It was insisted that the plaintiff's second prayer was bad, because it *assumed* a fact, viz, that the plaintiff was *injured by the automobile*. This was a *granted* prayer, and it is well settled that this objection, if well founded, cannot be considered on this appeal, as no special exception relying upon the alleged defect was taken in the trial Court. *Code*, Art. 5, sec. 9; *Gunther v. Dranbauer*, 86 Md. 1; *Vonderhorst Brewing Co. v. Amrhine*, *supra*.

*Judgment affirmed, with costs above and below.*

HENRY F. WINGERT AND WILLIAM WINGERT,  
ADMINISTRATORS OF P. HAGER WINGERT, DECEASED,  
ET AL.

vs.

WILLIAM H. ALBERT AND HARRY H. HARMAN.

*Appeals: interest of appellants; no right to reversal for alleged error against other persons; Orphans' Court, presumption in favor of official acts; appraisers; right to recover.*

Unless it appears from the record that the appellants have been injured by the order from which the appeal has been taken, the order will not be reversed on their appeal. p. 84

Parties who were not injured by the ruling of the Court below can not claim a reversal to correct an alleged error as to other persons. p. 84

The fitness and qualifications of appraisers appointed by the Orphans' Court, and their impartiality and disinterestedness to act as such, are questions of fact to be determined by the Court, and if the finding is adverse to the appraisers, the Orphans' Court has power to remove them. p. 85

There is a presumption in favor of the correctness of the findings of the Orphans' Court upon questions of fact. p. 85

*Decided November 11th, 1915.*

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Opinion of the Court.

Appeal from the Orphans' Court for Washington County.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Harvey R. Spessard* (with whom were *A. F. Wingert* and *Müller Wingert* on the brief), for the appellants.

*Edgar Allan Poe, Attorney-General*, and *Scott M. Wolfinger, State's Attorney for Washington County*, submitted the case on a brief for the appellees.

BURKE, J., delivered the opinion of the Court.

P. Hager Wingert, of Washington County, died intestate on or about July 23rd, 1913, and the appellants, Henry F. Wingert and William Wingert were appointed administrators of his estate. On February 20, 1914, upon the nomination of the administrators, the Orphans' Court of Washington County appointed Elmer A. Corderman and Claude K. Humrichouse to appraise the real estate of the deceased for the purpose of ascertaining the amount of collateral inheritance tax upon his interest in certain real estate mentioned in the proceedings. Upon certain proceedings had in the Orphans' Court of Washington County, that Court on October 3, 1914, ordered that the "administrators withdraw the inventory and appraisement returned by them on the 5th day of August, 1914; that they nominate for appointment by the Court two other qualified persons to appraise the real estate of P. Hager Wingert, deceased, and that they include in the inventory and appraisement returned by them, the six parcels of real estate of which Eliza J. Wingert died seized and possessed, mentioned in the testimony given in these proceedings." From this order the administrators and the appraisers have appealed.

This Court on the former appeal (*Wingert v. State*, 125 Md. 536) decided, "that it was entirely within the power and jurisdiction of the Orphans' Court to entertain and determine the question of an additional and amended inventory and appraisement of the real estate of the deceased, in this case, and the Court having jurisdiction had the right to hear and receive evidence in relation to it." But the Court did not agree with that portion of the order which directed the administrators to nominate for appointment two other appraisers in lieu of those appointed by the order of February 20, 1914. Upon this part of the order the Court said: "We can not, however, concur in that part of the order directing the administrators to nominate for appointment by the Court two other qualified persons to appraise the real estate of the deceased for the purposes indicated, so long as the order of the Court of the 20th of February, 1914, and the warrant issued in pursuance thereof, appointing the appraisers, remained in full force and unrevoked. Messrs. Cordorman and Humrichouse had been duly appointed and constituted the appraisers, under section 124 of Article 81 of the Code, to value the real estate of the deceased, and there is nothing in the record to show that they had been removed by the Court prior to the order in this case.

It would clearly have been competent and entirely within the power of the Orphans' Court, upon charges of incompetency, neglect of duty, or unfaithful conduct, injurious to the interest of the estate, if sustained by proof and upon a hearing, to have removed either the administrators or the appraisers and to have appointed others in their places. \* \* \* We will, therefore, reverse that part of the order which directs the administrators to nominate for appointment two other qualified persons to appraise the real estate of the deceased, but will affirm the order in other respects as to filing an amended and additional inventory and remand the cause for further proceedings." Accordingly the order was affirmed in part, and reversed in part, and the case remanded. Thereafter, on May 14, 1915, the State of Maryland by Scott M.

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Wolfinger, the State's Attorney for Washington County, filed a petition in the Orphans' Court in the matter of the estate of P. Hager Wingert, deceased, asking that Elmer A. Corderman and Claude K. Humrichouse, the appraisers, and each of them be cited by the Court "to show cause why they and each of them should not be removed as such appraisers, and others appointed in their place and stead." The grounds upon which this application was based are set out in the petition. *First*: "That the State of Maryland is interested in the appraisement of the real estate of P. Hager Wingert, deceased, by virtue of the collateral inheritance tax due the said State thereon; and that a correct and fair appraisement of the said real estate should be made to the end that the amount of collateral inheritance tax due the said State may be collected thereon." *Secondly*: "That the said appraisers in making the said appraisement were incompetent, neglected their duty as such appraisers, and that by their unfaithful conduct the interests of your petitioner were injured; and your petitioner further charges that the said appraisers are incompetent to properly perform their duties as such appraisers, and that they ought to be removed, to the end that a true and fair appraisement of said real estate may be made."

Citation was issued, and both appraisers were summoned and filed a joint answer to the petition. The answer denied the material facts which the petition assigned as cause for the removal of the appraisers. The issues made by the petition and answer were set for hearing, and after receiving testimony and hearing arguments on behalf of the respective parties, the Court filed an opinion, in which, after stating the reasons for the conclusion reached by it, said: "After having given careful consideration to the testimony and the able arguments of counsel in this matter, we can come to no other conclusion, though we do so with much regret and with no question of the integrity and good faith of Messrs. Corderman and Humrichouse, but that they are not persons of suitable qualifications, sufficiently *impartial* and *disinter-*

*ested* to act as appraisers for the purpose of assessing the Collateral Inheritance Tax, of the real estate of P. Hager Wingert, deceased, and that therefore the order of their appointment as such, passed by this Court, February 20th, 1914, must be revoked and the warrant issued to them on that date, to act as such appraisers, must be cancelled and annulled." The Court gave effect to this conclusion in the following order: "It is thereupon this 22nd day of June, 1915, by the Orphans' Court of Washington County, adjudged and ordered that the order, heretofore passed by this Court, to wit, February 20th, 1914, appointing Elmer A. Corderman and Claude K. Humrichouse appraisers of the real estate of P. Hager Wingert, deceased, and the warrant of the same date issued to the said Elmer A. Corderman and Claude K. Humrichouse, appraisers for the purpose of ascertaining the collateral inheritance tax to be charged on said real estate, be and they are hereby cancelled, revoked and annulled, and the said Elmer A. Corderman and Claude K. Humrichouse, appraisers, and each of them, are hereby removed as appraisers, as in said order and warrant heretofore constituted and appointed." From this order the administrators and the appraisers have appealed.

It is to be observed from the above recital of facts that no complaint was made against the administrators in the petition, they are not made parties to it, and no citation was issued against them. They are not affected by the order. The order is directed solely against the appraisers, and the administrators were not ordered or directed to do anything, as they were in the order in the former case. Under these circumstances they had no right to appeal. It is settled by all the authorities that unless it appears from the record that the appellants have been injured by the order from which the appeal has been taken, that order will not be reversed upon their appeal, even if erroneous as to the appraisers, because they have no cause of complaint, their rights not being affected. If there is no injury to them, they cannot claim a reversal to correct an alleged error as to other parties.

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Opinion of the Court.

As to the appeal of the appraisers, it will be observed from the portion of the opinion of the Orphans' Court quoted above that the Court had no question of the integrity and good faith of the appraisers, but based its actions upon their finding upon the facts before them that the appraisers were not qualified, and "sufficiently impartial and disinterested to act as appraisers, for the purpose for which they were appointed." These were largely questions of fact to be found by the Court upon the evidence before it, and there can be no doubt that if these facts be true the Orphans' Court had the power to remove the appraisers. *Cox v. Chalk*, 57 Md. 569; *Magin v. Niner*, 110 Md. 299; *Wingert v. State*, 125 Md. 536.

There is a presumption in favor of the correctness of the finding of the Court upon these questions of facts, and upon questions like those presented by this appeal, we think no good purpose can possibly be subserved by a discussion and recapitulation of the evidence. We have given it careful consideration, and, excluding such portions as were excepted to by the appraisers, we find no sufficient reason for reversing the order, and it will, therefore, be affirmed.

*Order affirmed, the appellants to pay the costs.*

CLARENCE E. STUBBS, INSPECTOR OF BUILDINGS, &C.,

vs.

WALTER SCOTT.

*Building permits: character of buildings; character of neighborhood. Mandamus: uses other than applied for.*  
*Fraud upon court.*

The authority to enact and enforce building regulations rests on the ground that it is a part of the police power. p. 90

An application for a building permit, for the erection of a store building, for general business purposes, can not be legally refused, merely because there are no other stores in the block, and because the other buildings were fine and costly dwellings. p. 90

To obtain by a mandamus a building permit, for the erection of store buildings for general business purposes, and afterwards use the building for a lawfully forbidden use, and one for which an earlier application had been properly refused, would be a fraud on the court that issued the mandamus, and should be promptly checked. p. 93

*Decided November 11th, 1915.*

Appeal from the Superior Court of Baltimore City.  
(DUFFY, J.)

The facts are stated in the opinion of the Court.

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Opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER and CONSTABLE, JJ.

*S. S. Field, the City Solicitor of Baltimore City*, for the appellant.

*Randolph Barton and James J. McGrath*, for the appellee.

BOYD, C. J., delivered the opinion of the Court.

This is an appeal from an order of the Superior Court of Baltimore City directing a mandamus to issue against the Inspector of Buildings of Baltimore City, requiring him to issue to the appellee a permit to erect a building on the lot described in the proceedings. The petition alleges that in February, 1915, the petitioner, "desiring to erect and conduct a sales-room and service station for the sale of automobiles, and for the other purposes incident to the business of such establishments," applied to the respondent for a permit to erect a building suitable for the said business on a lot of ground situated on the east side of St. Paul street in said City, but the permit was not granted; that subsequently petitioner, "being still anxious to secure a location on said lot for the sale of automobiles, abandoned the idea of establishing a service station at the place named, and purchased said lot of ground from the owners of the same and now owns said property."

Paragraph 4 of the petition is as follows: "Your petitioner now represents that he has filed his application with the above named defendant in his official capacity (a copy of which he herewith files, marked 'Petitioner's Exhibit S. W. No. 11½') in compliance with the ordinance of the Mayor and City Council of Baltimore, and of the laws in such cases made and provided, for a permit to erect on said lot four stores for general business purposes, in accordance with the provisions of the plat and specifications herewith filed; marked,

as to said plat 'Petitioner's Exhibit W. S. No. 2,' and as to said specifications 'Petitioner's Exhibit W. S. No. 3.' That your petitioner proposed to use one of said stores for the purpose of exposing for sale, and for selling automobiles. That the other stores he proposes to rent or if it proves to be expedient so to do, to sell them when they will be used for such purposes as stores so located may be profitably used."

The petition then alleges that the defendant refused to issue said permit, "and thereby your petitioner is restrained and prevented from disposing of his property and availing himself of his right to use it;" that the reason given for the refusal to grant the permit is set out in a letter filed, and the petition concludes by praying the Court to issue the writ of mandamus, directed to the defendant, "requiring him to issue to your petitioner the building permit in such cases made and provided."

The answer alleges, amongst other things, that respondent refused to issue the permit because he is advised that the issuance of it would not be in accordance with the law in such cases made and provided. The attorneys for the appellee wrote to Mr. Stubbs the following letter, before the petition was filed:

"June 15, 1915.

"Clarence E. Stubbs, Esq.,

"Inspector of Buildings, City Hall.

"Dear Sir—Mr. Walter Scott has heretofore filed with you his application for a permit to erect a building on the east side of St. Paul street between Preston and Mount Royal avenue. On his behalf we write to ask you if you would be kind enough either to make out the permit, or if you propose to reject it, to give the reasons for your objection, in order that he shall have opportunity to meet those objections as promptly as possible.

"Very respectfully,

"Barton, Wilmer & Stewart,

"Attorneys for Walter Scott."

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Opinion of the Court.

Mr. Stubbs replied as follows:

"June 15th, 1915.

"Messrs. Barton, Wilmer & Stewart,

"Attorneys for Walter Scott.

"Gentlemen—Replying to your letter of even date, with reference to application made by Walter Scott for the erection of building on the east side of St. Paul street, between Preston and Mount Royal avenue, beg to advise, that being this neighborhood is a strictly residential section, with no stores or buildings in said block or the block south of same, being used for purposes other than residential purposes, after taking this matter up with his Honor the Mayor, we are of the opinion that no permit should be granted for a store building in this neighborhood. Therefore, for the reasons above stated, we must decline the issuing of said permit.

"Very truly yours,

C. E. Stubbs,

"Inspector of Buildings."

Paragraph 12 of section 47 of the Building Code, as amended by Ordinance No. 32, approved November 28, 1911, provides that "The following buildings shall be limited as to location," and then follows a list of twenty-four buildings, &c.—the fifth of which is as follows: "5. Garages, automobile stations, or the places for the keeping of vehicles of any kind which are propelled by motive power, the intention of which is for any other purpose than the housing of not more than two machines or vehicles to be used for private purposes only by the person or persons occupying the same lot on which such structure is desired."

Paragraph 13 provides that: "No permit shall be given by the Inspector of Buildings for the erection of any such buildings without the approval of the Mayor, and, if such erection be approved by him, there shall be incorporated in the permit therefor such regulations regarding the location of said building as may be necessary, in the judgment of the

Mayor, to properly safeguard the interests of the public," and it then goes on to require notice of the application to be published in two daily newspapers, &c.

Cases of this character often present questions of difficulty. It is necessary to vest in the authorities of municipal corporations certain powers in reference to the regulation of buildings, the exercise of which may sometimes work hardships on owners of properties, proposed to be improved, and on the other hand, those who have already expended large sums of money may sustain injury by improvements made by others of a character which are objectionable and undesirable in such a neighborhood. The authority to enact and enforce building regulations rests on the ground that it is a part of the police power, but even that power, broad as it is, has its limits. But we do not feel called upon in this case to determine how far the regulations of the various kinds of buildings mentioned in this ordinance may be enforced, for it seems to us that the real question in the case is whether the appellee can be deprived of the right to improve his lot by the erection of stores, upon the ground that the proposed building does not conform to the character of buildings in that immediate neighborhood. The learned counsel for the appellant takes the position that the record shows that "The buildings are really intended for a garage, and that calling them stores is a mere subterfuge to get around the ordinance which lodges the discretion in the Mayor in regard to granting permits for garages." But the petition does not ask for a permit for a garage, and the respondent based his refusal, in the letter to the attorneys for the appellee, on the distinct ground that no permit should be granted for a store building in that neighborhood.

In his testimony, after speaking of the refusal to grant a permit for a garage under the application first made by the appellee, Mr. Stubbs was asked: "Tell his Honor why the second application, the one in controversy, was declined?" and he replied: "Several of the people who protested against

the original application, the first application, protested against the second application, although the application called for the erection of stores. They protested against the issuing of a permit for the erection of that kind of building in that neighborhood, and after taking the same up with his Honor, the Mayor, the Mayor advised me to withhold the permit." He admitted that he was influenced by the facts that the plan of the building was susceptible of being used as a garage and that the second applicant was the same person as the first applicant. He also admitted that he discredited Mr. Scott's good faith and his statement that he wanted it now for stores.

But in our judgment that was not sufficient to justify his refusal to grant the permit under the evidence in the record. A building erected for a church might with a few changes be converted into a garage, a theatre or something very different from what it purported to be intended for, but that can not be the test. The case of *People ex rel. C. H. Realty Co. v. Stroebel*, 209 N. Y. 434, S. C. 103 N. E. 735, is very analagous in many respects to the present one. The application in that case stated that the building was, "to be used and occupied for buying, selling, dealing in and otherwise disposing of vehicles, automobiles, motorcycles and other personal property." The ordinance of the City of Utica provided that, "No person, firm or corporation shall hereafter maintain or conduct a public garage for the storing, maintenance, keeping, caring for, or repairing of automobiles or motor vehicles within the city limits, without permission of the Superintendent of Buildings." The Superintendent of Buildings refused to issue a permit because "it manifestly appeared from an inspection of the application and plan submitted therewith that the fair intention of the plans and specifications was to erect, maintain and conduct a public garage." The Court said, "In view of the peculiar phraseology of the ordinance above quoted (No. 215, Sec. 1), and the specific ground upon which the respondent refused the

relator's application for a building permit, we have reached the conclusion that the respondent's determination and the order of the Appellate Division affirming it are not sustained by the record now before the Court." Again the Court said: "From the general description of the building, and the text of the specifications, we can do no more than to conjecture that the building may possibly be intended for use as a public garage, that is not enough." The Court reversed the order of the Appellate Division and the determination of the Superintendent of Buildings, without deciding whether the ordinance in question was a constitutional exercise of municipal authority, and added, "That question may be more fairly and fully presented in an action for an injunction if the relator does anything which may bring it within the condemnation of the ordinance." CULLEN, Chief Judge, concurred in the opinion of the Court, but was inclined to go further and hold that the respondent had no right to refuse the permit for the construction of the building, even though the owner did contemplate its use for the purpose of a public garage. It is proper to add that in that case the Court referred to the fact that the record did not satisfactorily show what evidence there was before the Superintendent of Buildings.

It was said in *Bostock v. Sams*, 95 Md. 400, on page 417, "If the building which the appellants propose to erect shall be put to the use it is alleged to be intended for, and a question shall then be raised as to the legality of that use, such question will then become one of interest to the community and of most serious import to those owning and making use of the property in question; but it has no place in this discussion."

As we have seen, the petitioner in this case asked for a mandamus to compel the respondent to issue a permit "to erect on said lot four stores for general business purposes, in accordance with the provisions of the plat and specifications herewith filed." The order of the lower Court directed "that the writ of mandamus be forthwith issued in manner and form as prayed in said petition," and we can not admit, as

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we understood it to be suggested at the argument by counsel for appellant, that the petitioner can obtain a permit, through the aid of the Court, to erect a building for purposes set out in his petition, and then after he has erected the building make use of it for purposes such as he is not entitled to use it for without first obtaining the approval of the Mayor—particularly for such purposes as his petition shows he first asked a permit for, which was refused. That would be a fraud on the Court which granted him the relief prayed for, and any attempt to perpetrate it could and should promptly be checked. We are not now called upon to pass on the validity of the ordinance, in so far as the particular provisions applicable to garages, etc., and numbered 5, are concerned, inasmuch as if the petitioner desired to attack the ordinance he could have done so, but, practically conceding it to be valid, abandoned further effort to get that permit and now seeks one for another avowed purpose. Hence we say he would not be permitted to erect a building, under a permit obtained by the help of the Court, for the purpose stated in the petition, and then use it for other purposes which were denied him. We do not mean to say he can not use a store to exhibit automobiles for sale, as he says his intention is, but he can not under the permit to be granted under this petition use it as a garage or service station, such as he first applied for.

So we are brought back to the question whether the appellant rightfully refused this permit, for the reasons he gave, and it seems clear to us that he did not. No authority has been shown to authorize him or the municipality to prevent the appellee from erecting a building on the lot to be used for stores, and we can not admit that he could not sell automobiles in his store on said lot. It was said in *Strobel's case*, *supra*, "There is nothing in the ordinance which purports to limit the right to erect and occupy buildings for the sale of vehicles, automobiles and motorcycles, and, it may be said in passing, any attempt to exercise any such power would be

unconstitutional, for the business of selling such vehicles is as lawful as the sale of groceries or dry goods." Of course, the right to regulate the use of automobiles and the storage of gasoline, &c., for such purposes in a particular locality may present a different question.

It can not be denied that less pretentious buildings than those already in a particular neighborhood may be and often are objectionable, not only to the owners of those there, but to other residents of the city, but if they comply with building regulations having reference to protection against fire and other things which can be validly regulated, we know of no way of preventing their erection, unless possibly it be under some very peculiar circumstances, different from those presented in this case. It was said in *Bostock v. Sams*, 95 Md., on pages 412-413: "It can not be pretended that the citizen has not the common law right to acquire title to a lot of land, qualified or absolute, in a City as elsewhere and to build upon, and improve it as his taste, his convenience or his interests may suggest, or as his means may justify, without taking into consideration whether his buildings and improvements will conform in size, 'general character and appearance' to the 'general character of the buildings previously erected in the same locality;' even though there might be those in whose 'judgment' his so building might in *some way* 'tend to depreciate the value of surrounding improved or unimproved property.'" Of course, we are aware that there were questions involved in that case which do not arise in this, but what we have just quoted is applicable here as well as there.

In *Cochran v. Preston*, 108 Md. 220, we affirmed an order of the lower Court dismissing an application for a writ of mandamus to require a permit to be issued to erect an additional story on the petitioner's property. We sustained the statute in question on the ground that its primary object was protection from fire, and was not passed for purely ornamental purposes. JUDGE WORTHINGTON, in delivering the opinion, quoted from *Freund on Constitutional Rights and*

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*Public Policy* (1904), Sec. 181, that "If the purposes were purely aesthetic, the impairment of property rights, even upon the payment of compensation, would not pass unchallenged," and also from *Tiedeman on State and Federal Control of Persons and Property*, 755, that "Regulations which are designed only to enforce upon the people the legislative conception of artistic beauty and symmetry will not be sustained, however much such regulations may be needed for the artistic education of the people." He added, "Such is undoubtedly the weight of authority, though it may be that in the development of a higher civilization the culture and refinement of the people has reached the point where the educational value of the 'Fine Arts,' as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction, under some circumstances, to the exercise of this power even for such purposes." And he also quoted from *Welch v. Swasey*, 193 Mass. 364, that "If the primary and substantial purpose of the legislation is such as justifies the Act, consideration of taste and beauty may enter in as auxiliary."

We are not now called upon to say under what circumstances, if it be conceded that there are some, there may be a valid statute passed for the purpose of artistic beauty and symmetry alone, or purely aesthetic purposes, as it is contended by the appellant that JUDGE WORTHINGTON intimated might be done. No such statute is relied on in this case, and we are not aware of any law in force here, even if it be possible that there could be such a valid statute or ordinance which would prevent an owner of property from erecting a building in such a locality as this, simply because it would be used for stores. Opening stores in some neighborhoods may be injurious to surrounding properties occupied for residences, but it would be difficult, if not impossible, to prevent an owner from converting his residence into a store building, even in the most exclusive part of the city, if he saw proper to do so. Other considerations than whether they

can be prohibited by law generally control the owners in such matters. But it would be going very far to say that the owner of this lot could not erect stores on it, simply because there are now no stores there, and there are valuable properties of other kinds in the immediate neighborhood. Everyone familiar with the City of Baltimore, or any other large city, for some years knows how neighborhoods have changed in such respects, and, as business grows, properties formerly residences are often converted into stores and other places of business, as indeed the testimony shows in the case near this locality. If the courts had power to prevent the introduction of stores in such localities as the one now before us, the exercise of that power might result in serious injury to those having vacant lots or desiring to convert their buildings into stores, if there may shortly be a change of the use of properties in the immediate locality. It may not be out of place, under the peculiar circumstances of this case, to suggest the advisability of the appellee and the city authorities endeavoring to agree upon definite uses of this property, as it may avoid further litigation and result in some protection to the neighborhood which the appellant thinks should be given it, but which the Court is of the opinion can not be given in this case.

Being of the opinion that the appellee was entitled to the permit, the order of the lower Court must be affirmed.

*Order affirmed, the appellant to pay the costs.*

Md.]

Syllabus.

NATIONAL COUNCIL, JUNIOR ORDER UNITED  
AMERICAN MECHANICS, A BODY CORPORATE,

vs.

KATIE N. BARBOUR.

*Benevolent order: rules; construction of—.*

The rules of a benevolent society, briefly speaking, provided that no claims could be made against it for the death of a member from any disease, which had demonstrated itself prior to his admission or reinstatement therein; it further provided that when a member was in arrears in his dues to a certain amount, it should amount to a disqualification as to all sick or death benefits on his account, until three months after the arrears and all current dues should have been paid. A member who was in arrears complied with the rules for reinstatement, and subsequently died of tuberculosis; there being no proof that he was afflicted with that malady before his admission into the order, it was: *Held*, that his beneficiaries were entitled to recover the death benefits.

p. 103

*Decided December 1, 1915.*

Appeal from the Court of Common Pleas of Baltimore City. (DOBLER, J.)

The facts are stated in the opinion of the Court.

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The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Arthur L. Jackson*, for the appellant.

*W. Harry Holmes*, for the appellee. .

CONSTABLE, J., delivered the opinion of the Court.

This suit was instituted to recover from the appellant the sum of five hundred dollars, being the amount claimed to be due, as a funeral benefit, upon the death of John G. Pietsch, to the appellee as widow and beneficiary.

Mr. Pietsch had become a member of Liberty Bell Council No. 147, a local council of the Junior Order of United American Mechanics, and had received a certificate of membership from the council whereby the said council promised "to pay at the death of said Brother to Katie Pietsch (wife) such sum as is due under the laws of this Council at the time of his death; provided, however, that the said Brother has complied with all requirements of the Council and is not in arrears at the time of his death." Liberty Bell Council was a member of the Funeral Benefit Department, a subsidiary association created by virtue of the constitution and laws of the National Council, Jr. O. U. A. M., and whereby each member of the local council enrolled as a member of the Funeral Benefit Department was to have paid, at his death, five hundred dollars to his dependent. No medical or physical examination was required for membership. Mr. Pietsch, by virtue of his membership in the local council, became at the same time an enrolled member thereof. The dues for each member of the Funeral Benefit Department were paid by the local council out of the dues received by it from its members. By section 4 of Article 4 of the By-Laws of Liberty Council, the annual dues were fixed at nine dollars, payable weekly; and by section 5 of the same article it was made the duty of each member to pay his dues on or

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## Opinion of the Court.

before the last meeting night in each quarter, the year being divided into quarters, each ending on the last meeting nights in March, June, September and December. And it was provided in said section: "Any brother owing thirteen weeks or more dues shall not be entitled to receive sick or death benefits until three months after paying all arrears in full to date of payment." Section 6 of the same article provides that when it should appear from the books that a brother was non-beneficial the financial secretary should notify the councilor of that fact "who should instruct the recording secretary to drop his name from the roll of the Funeral Benefit Department, Class B, and said brother's name shall not be entered on roll of said association until he becomes beneficial in the council."

The sick benefits as provided in the by-laws of the council are found in section 1 of Article 5, and provide that any member who has been such for six months and is taken sick or disabled and is unable to follow his usual or other occupation of any kind shall be entitled to receive two dollars for the first week and four dollars for thirteen weeks thereafter, benefits not to exceed fourteen weeks in any one year "provided said sickness or disability does not proceed from intemperance or other immoral conduct or does not result from disease contracted or that may have manifested itself prior to his initiation."

It appears from the testimony taken that Mr. Pietsch paid his dues of two dollars and twenty-five cents quarterly until the June (1910) quarter, and on September 2nd, 1910, he was declared non-beneficial in the council and the recording secretary notified the secretary manager of the General Benefit Department to drop the name of Pietsch from the roll. On September 9th, 1910, Pietsch paid his arrears for the June quarter, and also the amount to be due the quarter ending the last of September. Three months thereafter, December 9th, 1910, Pietsch, having then again become beneficial, the recording secretary directed the secretary-manager of the Funeral Benefit Department to re-enroll Pietsch,

at the same time certifying that he was in sound bodily health. This was accordingly done. On December 30th, 1910, Pietsch was reported sick to the Council, and on February 3rd, 1911, by action of the Council, five (5) weeks' sick benefits were paid him.

It further appears from the testimony that up until the 26th of October, 1910, Pietsch had been engaged at his usual occupation and that on that day he went to the Municipal Hospital in Baltimore and did not return home until February 25th, and died on February 27th, 1911, of tuberculosis.

Although there were several exceptions taken to the rulings of the lower Court, on questions of evidence, they all revolve about, and refer to practically one point; and upon the determination of this point depends the correctness or incorrectness of all of the Court's rulings, both as to the exceptions to the evidence, as well as to the prayers. In the settlement of this question there are no legal differences between the parties, but the difficulty arises over what is the true construction of the laws governing these different departments, created under the constitution of this appellant, as applicable to the facts of this case.

The theory upon which the appellant resists this claim is, that since Pietsch had been dropped from the roll of the Funeral Benefit Department, for non-payment of dues to his Council for a period of thirteen weeks, he could not be reinstated therein unless at that time he was in sound bodily health; and that the fact that he was at that time confined to a hospital, suffering from tuberculosis, from which he subsequently died, was evidence tending to show that the certificate of the recording secretary, stating him to be in sound bodily health, was a mistake in fact. The lower Court declined to take this view, and refused to admit testimony bearing upon the health of Pietsch at the time he became beneficial in the Council and when he was re-enrolled in the Funeral Benefit Department, and granted instructions to the effect that if the jury found that at the time the

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arrearages were paid on September 9th, 1910, Pietsch was in apparent good health and that from that time until his death he was not in arrears for one quarter's dues and that he was a beneficial member of the Council at the time of his death and had been re-enrolled in the Funeral Benefit Department, that then the appellee was entitled to a verdict. The practical effect of the instructions was, since the other facts were conceded, that the appellee was entitled to recover unless the appellant could show by a preponderance of the evidence that Pietsch was suffering with the disease which caused his death at the time he was admitted to the order.

We are of the opinion that the view of the lower Court is borne out by a study of the laws of the different departments.

By the Constitution of the National Council, the Constitution and the laws enacted thereunder by the National Council shall be the supreme law of the Junior Order United American Mechanics; and by Division 4, Chapter 5, section 1, it provides: "As a member shall stand in his Council so shall he stand throughout the order, etc." In the book entitled "Revised Laws of the Funeral Benefit Department of the National Council Junior Order United American Mechanics," sections 5-8, inclusive, are under the heading of the word "Application." Section 6 furnishes a form to be used by a council in making application for membership and contains the following provision: "We hereby agree to make no claim on you for benefits upon the death of any brother who is not in good standing in the Council at the time of his death or who is not entitled to death benefits according to the constitution and by-laws of this Council, nor who may be sick or disabled at the time of admission of this Council in the Funeral Benefit Department, nor who has engaged in the liquor business contrary to the laws of the order, nor for benefits upon the death of any member from a disease which may have demonstrated itself prior to his admission to the order or reinstatement therein. \* \* \* We hereby agree that no benefits shall be paid where the deceased has been

received to membership in violation of the laws and decisions of the order, or where the disease or disability which caused death demonstrated itself prior to the member's admission to the Funeral Benefit Department." Section 8 is as follows: "Only beneficial members of Jr. O. U. A. M. in good standing, not over fifty-five years of age at last birthday, and who became beneficial members when under fifty years of age, and who are in sound bodily health, may be enrolled in the Funeral Benefit Department, and none other shall be included in the list furnished by the recording secretary when making application for membership, or at any time thereafter." Under section 14, "Good Standing," is defined as follows: "No member who is in arrears for dues for thirteen weeks at the time of his death or at the time he become sick or disabled shall be entitled to death benefits, and no member who is thirteen weeks or over in arrears for dues at the time he becomes sick or disabled can place himself in good standing or become entitled to benefits during such disability by paying up such arrearages in part or in full during the continuance of such sickness or disability."

It will be noticed from the quotation above of section 6 that the Council agrees not to make any claim for benefits "upon the death of any member from a disease which has demonstrated itself prior to his admission to the order or reinstatement therein." The latter part of the section has no force here because Pietsch's admission in both was at the same time. In our opinion under the wording of this section the Court was absolutely correct in ruling as it did. There was not a particle of proof that the disease which eventually caused the death of Pietsch had demonstrated itself prior to his admission. Nor could it be considered as showing itself before he was reinstated, for he never was in a position to be reinstated. The fact that he was non-beneficial did not mean that he was out of the order but that while he was still a member he could not draw benefits. This is made clear by Articles 12 and 13 of the By-Laws of Liberty Bell Council. By section 1 of Article 12 the only penalty

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Opinion of the Court.

for being in arrears for thirteen weeks is that the member is "disqualified from receiving sick or death benefits for the space of three months after paying all arrears to date." But section 1 of Article 13 provides: "Any brother owing six months' dues shall be *suspended*" and section 2 deals with the method of re-instatement after a suspension. So to our minds, under the meaning of the By-Laws, Pietsch never was in the class provided for by the clause of section 6 "from a disease which may have demonstrated itself prior to his re-instatement." If then at the time of his death he was beneficial under his council then he was entitled to have his name enrolled in the Funeral Benefit Department irrespective of whether or not he was in sound bodily health at the time of his re-enrollment, provided he was not sick nor disabled at the time he paid his arrearages on September 9th, 1910.

The appellant contends that section 8, quoted above, is the section that should govern and makes the point that the concluding words "or at any time thereafter" mean that the member to be re-enrolled are to have the qualifications as to health, etc. We cannot agree to this contention. The section is dealing, just as did section 6, with the application of the council to become a member of the Funeral Benefit Department, and is an instruction to the recording secretary as to what members of the council can become enrolled and finally concludes with notice that, hereafter, meaning of course after the council has become a member, all new members taken into the council will have to conform to the health and other requirements before they can become enrolled as members of the Funeral Benefit Department.

Finding no errors in the rulings of the lower Court the judgment will be affirmed.

*Judgment affirmed, with costs to the appellee.*

EDWARD V. DUERING, ET AL.,

vs.

EMANUEL BRILL, ET AL.

*Wills: construction; absolute estates; a subsequent clause cutting down to life estate, held to apply to cases of death before testator.*

What is said in the construction of one will is but seldom conclusive in the consideration of another. p. 110

A testator, after some personal bequests, left the third of the residue and remainder of his estate to his wife, and then provided:

"Second, the other two-thirds of my estate I give, devise and bequeath unto my four following named children, Edward V., Eleanor C., Mamie J. Duering, and Emma C. Brill, equally, share and share alike, absolutely, and forever, with full power to dispose of either by sale, or in any manner whatsoever, they or any of them may see fit or proper \* \* \* "

"Third, in case of the death of either of my aforesaid children, then his, her, or their share or shares so as above devised and bequeathed, shall go to the child or children then living of the one so dying. But in case he, she, or they die without leaving any such child or children surviving, then the share of the one so dying shall go to my surviving children, share and share alike."

In construing this will, it was: *Held*, that its third provision was not intended to, and did not, have the effect of cutting down to life estates, or defeasible fees, the shares given absolutely by the second provision of the will. pp. 111-112

This third clause was intended only to provide alternative beneficiaries for the shares of any child or children, who might predecease the testator, without leaving issue. pp. 111-112

*Decided December 1, 1915.*

Md.]

Opinion of the Court.

Two appeals from Circuit Court No. 2 of Baltimore City.  
(HEUSLER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, UNER, STOCKBRIDGE and CONSTABLE, JJ.

*Robert W. Mowbray* (with whom was *Harry T. Kellman* on the brief), for the appellants.

*Clarence A. Tucker* (with whom were *Saml. J. Harman*, *Chas. H. Knapp* and *Jos. N. Ulman*, on the brief), for the appellees.

BOYD, C. J., delivered the opinion of the Court.

A bill in equity was filed by the administrator with the will annexed of George S. Duering, deceased, two children and the widow of said Duering, together with the wife of one of said children, against the husband and the children of Emma C. Brill, deceased, who was a daughter of George S. Duering. The prayers of the bill were: 1. That the real estate of which Geo. S. Duering died seized and possessed of be sold, etc.; 2. That the opinion of the Court, and a decree in conformity therewith, may be had with reference to what interest or estate the plaintiffs, Edward V. Duering and Eleanor C. Duering, and the defendants, Alfred P. Brill, Emma Brill and Margaret Brill, have in the said real estate under the provisions of the second and third paragraphs of the will of George S. Duering, and 3. For general relief. Later Mary E. Houck and the other children of Edward V. Duering were made party plaintiffs. Answers were filed, testimony taken and a report of the auditor and master filed, in which he stated that counsel requested that the construc-

tion of the will be reserved for future adjudication. On April 13, 1914, a decree was passed for the sale of the property, which concluded by saying that, "All other questions arising out of these proceedings, especially the construction of the last will and testament of the said George S. Duering and the distribution of the proceeds of the sales hereby ordered, be and the same are hereby reserved for future order and decree of this Court."

On July 23rd, 1914, an auditor's report was filed whereby, after allowance of costs, etc., there was distributed the sum of \$6,704.37—one-third to the widow, Mary Anne Duering, two-ninths to Edward V. Duering and Eleanor C. Duering, each, and two twenty-sevenths to each of the three children of Emma C. Brill. That audit was duly ratified on August 4th, 1914, no exceptions being filed, and the amounts paid to the respective parties by the trustees.

On October 8th, 1914, Eleanor C. Duering and Edward V. Duering filed a petition alleging that Mamie J. Duering died unmarried and intestate in the lifetime of her father, the testator, and Emma C. Brill also died in the lifetime of her father and that the one-fourth of the two-thirds part of the estate of the said George S. Duering, to which Mamie J. Duering would have been entitled, had she been living at the time of the death of her father, should be equally divided between the petitioners, and that the heirs of Emma C. Brill are not entitled to any part thereof. It then stated that the trustees had in hand the sum of \$1,763.00 and an irredeemable ground rent yet to be sold, and asked that in the next distribution each petitioner be allowed the sum of \$186.36 before any distribution be made amongst others. An order to show cause was passed and the Brills answered, denying that the construction of the will contended for by the petitioners was correct, alleging that it was *res adjudicata* and that the petitioners having accepted the distribution made in the audit, it was too late to make objection to it, or to the theory on which it was stated.

Md.]

Opinion of the Court.

On December 4, 1914, the plaintiffs filed a bill of review having the same object in view. That was demurred to and on February 13, 1915, the demurrer was sustained and the petition and bill of review were dismissed. From that decree an appeal was taken April 8th, 1915, by Edward V. Duering and others. On April 16th, 1915, another audit was filed and a distribution was made similar to that in the first audit. Exceptions were filed by Edward V. Duering and Eleanor C. Duering to the audit on the same grounds as those taken in the petition and bill of review. Those exceptions were overruled and that audit was ratified. On June 15th, 1915, an appeal was taken by Edward V. Duering and Eleanor C. Duering from that order of the Court.

Much of the arguments of both appellants and appellees was devoted to the questions of *res adjudicata* and laches, but under our construction of the will, it becomes unnecessary to discuss those questions. The will of the testator was executed on the 30th of August, 1894, and he died on July 16th, 1913. After making some personal bequests and giving one-third of the rest, residue and remainder of his estate to his wife, the testator made these provisions:

"Second—The other two-thirds of my estate I give, devise and bequeath unto my four following named children, Edward V., Eleanor C., Mamie J. Duering and Emma C. Brill, equally, share and share alike, absolutely and forever, with full power to dispose of either by sale or in any manner whatsoever they or any of them may see fit or proper.

"My daughters' shares or portions to be free from the debts, contracts or engagements of any husband they or either of them may now or hereafter have, and not in any manner whatsoever subject to the control or interference of any such husband or husbands.

"Third—In case of the death of either of my aforesaid children, then his, her or their share or shares so as above devised and bequeathed, shall go to the child or children then living of the one so dying.

But in case he, she, or they die without leaving any such child or children surviving, then the share of the one so dying shall go to my surviving children, to be divided between them share and share alike."

Mamie J. Duering was unmarried and died intestate fourteen or fifteen years before the testator died and Emma C. Brill died March 29th, 1911, over two years before the testator, leaving three children who were made defendants in this case. There can be no doubt that the terms of paragraph second, without some qualification or limitation in the will, were sufficient to vest an absolute fee simple estate in Mamie J. Duering, if she had survived her father, and as paragraph third is the only one claimed to be such a qualification or limitation, we will consider that in connection with some cases reflecting on the subject.

In *Combs v. Combs*, 67 Md. 11, devise was, "all my estate, real and personal, to my son, George H. Combs, to him and the heirs of his body lawfully begotten, with full power and authority to him, the said George H. Combs, to sell and convey the same in his lifetime or to dispose of the same by last will and testament; but should he, the said George H. Combs, die without issue of his body lawfully begotten, and without having disposed of the same by sale, or by last will and testament, either in whole or in part, then I give and devise," etc., to others named therein. The Court said: "It is difficult to see how the devisee could have more absolute control and dominion over the property. Even if there had been no words of inheritance, and the estate had merely been devised to George generally and indefinitely, the absolute power of disposition would have carried the fee. *Benesch v. Clark*, 49 Md. 497." It was held that the limitation over was void, and that on death of George, without issue, and without having made any disposition of the estate, the land descended to his heirs at law. The language in the will before us is certainly as strong, if not stronger than that in the Combs will.

Md.]

Opinion of the Court.

In *Lumpkin v. Lumpkin*, 108 Md. 470, Robert G. Lumpkin, by his will, "gave to his widow his dwelling house and its contents absolutely, and also gave her four-tenths of his entire estate for her life, with remainder to his children to be equally divided between them. He then gave, without any expressions of qualification or limitation, to each one of his five children one-tenth of his estate less whatever the recipient might owe him at his death," and after giving one-tenth in trust for his grandchildren, he added this clause: "In case of either of my childrens' death without leaving lawful issue, then I will and direct that their portion or inheritance in my estate shall be equally divided between my wife and my surviving children." JUDGE SCHMUCKER, after quoting that clause, said: "The true meaning of that sentence is the question of construction lying at the root of the entire litigation of which the present appeals are the latest development. The appellant contends that the death therein referred to of a child without issue means such a death in the lifetime of the testator, while the appellees insist that it means such a death whenever it shall occur. It is conceded by all parties that under Article 93, section 325 of the Code, the devise over is not void for indefiniteness."

In passing on the decree of the lower Court he said: "In our judgment the limitation over was intended to apply with equal force to the entire share or interest of each child in the father's estate, *and to operate as an alternative gift to the mother and other children of the share of any child who might die without issue in the father's lifetime.* As all the children survived the father the limitation over was never called into operation, and each child took at the father's death an estate in fee in his share of the realty, and an absolute estate in his share of the personalty, subject however, as to the enjoyment of his share of so much of the estate as was given to the mother for life, to her life estate therein." Again on page 497 he said: "We think that the testator, having in the earlier part of his will given absolutely to his children in specified portions nine-tenths of his estate, subject to his

wife's life interest in four-tenths, intended by the clause in question only to provide alternative beneficiaries for the shares of any of his children who might predecease him without leaving issue to represent them at the distribution of the estate, and did not intend to cut down to life estates or defeasible fees the shares which he had given to his children absolutely."

The briefs in *Lumpkin v. Lumpkin* evidenced such diligence and ability on the part of the counsel as to call for favorable comment by the Court. So many authorities were collected in them, and referred to by the Court, that we are relieved from the necessity of now citing many decisions, and we have quoted so much from that opinion because what is said is in many respects applicable to this case, and might determine it if the intention of Mr. Duering was less clear than it is. Of course we are aware that some facts were relied on in that case which do not exist here, and that it rarely happens that what is said in the construction of one will is necessarily conclusive in the consideration of another, but what is said of the object of the testator in inserting the clause in question in that will is so strikingly similar to what we believe the intention of Mr. Duering was that we have made more use of that opinion than is customary.

Provisions for two cases were made in paragraph third—the one when a child of a testator died leaving a child or children, and the other when one of them died without leaving a child. The paragraph begins: "*In case of the death of either of my aforesaid children, then,*" etc. There could be no contingency about the death of any of his children, except as to the time. As was said by CHIEF JUDGE MCSHERRY in *Gerting v. Wells*, 100 Md. 93: "Death is not a contingent event at all; it is, as said by this Court in *Hammett v. Hammett, et al.*, 43 Md. 311, 'an absolute certainty' ". And yet after the testator had left an estate to his four children in terms as broad as could possibly be desired to give them fee simple interests, he said: "*In case of the death of either, then his, her or their share or shares so as above devised*

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Opinion of the Court.

and bequeathed shall go to the child or children then living of the one so dying." He had by paragraph second given them all in the property that it was possible for him to leave them, and having given them all, there was nothing for him to leave to their children. If the clause could have any effect (other than stated hereinafter) it would be to reduce the estate to a mere life estate, which would be contrary to his plain language, used in the second paragraph, as well as to the thoroughly established doctrine announced in *Benesch v. Clark*, 49 Md. 497, and other cases in this State.

It is therefore certain that if such was the testator's intention it can not be carried into effect, as that clause can not lessen the broad gift already made, and we do not think this belongs to the class of cases where a fee is first given, and is then made defeasible, if the devisee dies without issue. But what was his intention, as gathered from paragraph third? In our judgment there can be no difficulty in determining that. Having given the interest in the estate to the four children "*absolutely and forever, with full power to dispose of either by sale or in any manner whatsoever, they or any of them may see fit or proper,*" and not even limiting paragraph third to such part of the estate as a child dying had not disposed of, the only reasonable construction to give that paragraph, in order that it may have some effect, is that he intended to make provision for just such a case as did actually happen—that is to say, for one or more of his children dying in his lifetime. As was said in *Lumpkin v. Lumpkin*, *supra*, the limitation over was intended "to operate as an alternative gift to the mother and other children of the share of any child who might die without issue in the father's lifetime," or, in the language used in another part of the opinion, the testator "intended by the clause in question only to provide alternative beneficiaries for the shares of any of his children who might predecease him without leaving issue to represent them at the distribution of the estate, and did not intend to cut down to life estate or defeasible fees the shares which

he had given to his children absolutely." That not only harmonizes the provisions in the will, and makes them all effective, but carries out what seems to us to be the intention of the testator, as manifested by the will itself. Therefore, the "alternative beneficiaries" in the will were, from the death of Mamie J. Duering until the death of Mrs. Brill, Edward V. and Eleanor C. Duering and Emma C. Brill. It was just as if the name of Mamie J. Duering had been taken out of paragraph second.

The testator lived fourteen or fifteen years after the death of his daughter Mamie and made no change in his will. He is presumed to have known that by her death what he had intended as her share had gone to his three surviving children under paragraph third (if effect be given it), or that it would lapse, or be saved from lapsing by virtue of the statute, section 326 of Article 93. In either event the three children of Mrs. Brill would take what would have been their mother's share in Miss Mamie's estate, if she had survived the testator.

Of course, we do not overlook the fact that a will takes effect at the death of the testator, but that is not the question here. The question is who became entitled to the share of Mamie J. Duering, as the "surviving children" of the testator, if paragraph third be given effect, as it can be under our construction. He indicated by terms which admit of no serious doubt that they were those of his children who were surviving at the time of her death.

So without discussing other questions which were argued, for the reasons we have given we will affirm both decrees.

*Decrees affirmed, the appellants to pay the costs.*

Md.]

Syllabus.

## CHARLES H. WHITING

vs.

## FLORENCE A. SHIPLEY, ADMINISTRATRIX.

*Administration: jurisdiction; domicile or residence; married women; separation from husband. Courts of concurrent jurisdiction.*

In determining in what county application should be made for letters of administration on an intestate's estate, the word "residence," as used in section 14 of Article 93 of the Code, means the fixed and permanent home or domicile of the deceased, as distinguished from a place of temporary abode.

p. 117

Under section 14 of Article 93 of the Code, letters of administration upon the estate of an intestate can only be granted by the Orphans' Court of the county in which he had his domicile at the time of his death.

p. 117

The general rule is that, in the absence of a decree of separation or divorce, the legal domicile of a wife follows that of her husband.

p. 118

The mere fact of their living apart does not affect the question, unless there is a judicial decree of divorce or of separation.

p. 118

It is the province of the Orphans' Court to determine the question of *residence* of an intestate, and their decision can not be reviewed in collateral proceedings.

p. 118

In general, when two courts have concurrent jurisdiction over the same subject-matter, the court in which the suit is first commenced is entitled to retain it, and the other co-ordinate court has no authority to interfere, and should, as soon as judicially informed of the pendency of the prior suit, dismiss the subsequent proceedings.

p. 119

But the party complaining against the jurisdiction exercised by one such court, upon the ground that the jurisdiction of

another court had already been invoked, must adduce proof to sustain the allegation. p. 119

Where an application had been made, to the Orphans' Court of one of the counties, for letters of administration on a decedent's estate, and application for letters on the same estate was made, on the same date, to the Orphans' Court of Baltimore City, it was: *Held*, upon appeal, that the order of the Orphans' Court of Baltimore City refusing to revoke letters actually granted by it on such application, should not be reversed, merely because of the application made to the other Court, especially when the decision of the Orphans' Court of Baltimore City, as to the residence of the deceased was correct. p. 119

*Decided December 1st, 1915.*

Appeal from the Orphans' Court of Baltimore City.

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., 'BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Reuben Garey and Archey C. New*, for the appellant.

*Robert H. Carr and Benjamin Kann*, for the appellee.

THOMAS, J., delivered the opinion of the Court.

Mrs. Ida A. Whiting died in Baltimore City on the 21st day of September, 1914, and on the 29th of the same month Florence A. Shipley, of Baltimore County, her oldest daughter, filed in the Orphans' Court of Baltimore City an application for letters of administration upon her estate. On the same day the Court passed an order requiring Dr. Charles H. Whiting, the husband of the deceased, to appear in said Court on the 1st day of October, 1914, and show cause why letters of administration should not be granted. The citation was returned "summoned," and the record shows that in response to said order Dr. Whiting appeared before that Court on the 1st of October, 1914, "by attorney and stated that letters of administration upon said estate had been

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## Opinion of the Court.

granted in Carroll County." The Orphans' Court of Baltimore City thereupon issued another citation for Dr. Whiting requiring him to appear before that Court on the 5th of October, 1914, and to show cause why letters of administration should not be granted, etc., and in obedience to that summons he appeared before said Court on the day named and "refused to take letters of administration," and the Court granted letters of administration to Florence A. Shipley.

Thereafter, on the 27th of October, 1914, Dr. Whiting filed in the Orphans' Court of Baltimore City a petition, alleging that Mrs. Whiting died on or about the 25th of September, 1914, "leaving surviving her your petitioner, her lawfully wedded husband," Gladys Whiting, an infant daughter "by said marriage," and two daughters by a former marriage, namely, Florence A. Shipley and Blanche Mitten; that "on or about" the 29th of September, 1914, he applied to the Orphans' Court of Carroll County for letters of administration upon the estate of his said wife, "and that letters were refused him on the ground that he could not produce a certificate of his marriage"; that immediately thereafter he took steps to obtain a copy of his marriage certificate with the view of obtaining letters of administration from the Orphans' Court of Carroll County on the 6th of October, 1914; that on or about the 5th of October, 1914, Florence A. Shipley made application to the Orphans' Court of Baltimore City for letters of administration, and that he was summoned to appear before that Court; that in view of the pending proceedings in the Orphans' Court of Carroll County, and believing that it was improper and detrimental to the interest of the estate to ask for letters of administration in Baltimore City, and not knowing the consequences of his refusing the same, "he did refuse to take out letters of administration in this Court," and that letters were forthwith granted to Florence A. Shipley; that he applied to the Orphans' Court of Carroll County for letters because "the greater part of the estate of said decedent was situated in Carroll County," and because he could obtain a bond there

without expense or inconvenience to himself or to the estate, and that he had recently been advised that it was lawful and proper and for the best interests of the estate to obtain letters of administration in the Orphans' Court of Baltimore City. The petition then prayed that the letters previously granted to Florence A. Shipley be revoked, and that letters of administration be granted to him. That petition was answered by Florence A. Shipley, and on the 3rd of December, 1914, Dr. Whiting filed an amended petition, containing practically the same averments, in which the only relief asked was that the letters previously granted be revoked. Florence A. Shipley also answered the amended petition, and after a hearing, at which testimony was produced by the petitioner, the Orphans' Court of Baltimore City passed an order dismissing the amended petition, and from that order the petitioner has appealed.

It appears from the evidence produced at the hearing that Dr. Whiting, at the time of the death of his said wife, and for twenty-four years prior thereto, was a resident of Baltimore City. They had not lived together for six or seven years before her death. She left his home in Baltimore City and went to the home of her daughter, Florence A. Shipley, in Baltimore County. From there she went to her daughter's home in Philadelphia, and from there to the home of her brother-in-law, John T. Wagner, in Carroll County, Maryland, where she lived for two or three years. About six or seven months before her death she went to her nephew's, Howard Shipley's, in Carroll County, and was there for three or four months before she returned to Baltimore City, where she was living at the time of her death. The evidence also shows that Dr. Whiting applied to the Orphans' Court of Carroll County for letters of administration on the 29th of September, 1914, and that on that day the Orphans' Court of Carroll County issued a citation for Florence A. Shipley to appear, etc., on the 6th of October, 1914. The citation for Florence A. Shipley was never returned to the Orphans' Court of Carroll County, and, so far as the record discloses,

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Opinion of the Court.

no further action was taken upon the application of Dr. Whiting in that Court.

Counsel for the appellant claim that the evidence shows that Dr. Whiting applied to the Orphans' Court of Carroll County for letters of administration on the 28th of September, 1914, but the testimony of Mr. Arthur, the Register of Wills, the affidavit of Dr. Whiting to his petition for letters filed in that Court, and the original and amended petition in the Orphans' Court of Baltimore City clearly show that formal application to the Orphans' Court of Carroll County was not made until the 29th of September.

Section 14 of Article 93 of the Code provides that "when-ever any person shall die intestate, leaving in this State personal estate, letters of administration may forthwith be granted by the Orphans' Court of the county wherein was the party's mansion house or residence; or in case he had no mansion or residence within the State, letters shall be granted in the county where the party died," etc.

The word "residence" in this section of the Code has been repeatedly construed to mean the fixed and permanent home or domicile of the deceased, as distinguished from a place of temporary abode, and letters of administration can only be properly granted by the Orphans' Court of the county in which he had his domicile at the time of his death. *Raborg v. Hammond*, 2 H. & G. 42; *Shultz v. Houck*, 29 Md. 24; *Harris v. Pue*, 39 Md. 535; *Ensor v. Graff*, 43 Md. 291; *Stanley v. Safe Deposit Co.*, 87 Md. 450; *Oberlander v. Emmel*, 104 Md. 259; *Cain v. Miller*, 117 Md. 45; *Sudler v. Sudler*, 121 Md. 46.

The general rule is that in the absence of a decree of separation or divorce the legal domicile of a wife follows that of her husband. In *Jacobs on Domicil*, sec. 209, the author says: "As a general rule, it has been universally held in all civilized countries, and in all ages, wherever the subject of domicil has been discussed, that, upon marriage, the domicil of the wife merges in that of the husband, and continues to follow it throughout all of its changes, so long

as the marriage relation subsists." In 14 *Cyc.* 846-7, we find the statement: "Following out the theory of an identity of person, the law fixes the domicile of the wife by that of the husband and denies to her during cohabitation the power of acquiring a domicile of her own separate and apart from him. \* \* \* Regarding the rule just stated as absolute, it has been held not to be affected by the fact that the husband and wife are living apart in the absence of a judicial decree of separation or divorce." The rule as stated was applied by JUDGE MILLER in *Ensor v. Graff*, *supra*, where, after referring to the evidence tending to show the residence of the husband, he said: "Upon these facts it is clear, we think, that the *residence* of Fowler and his wife, at the period of his death, was, for the purpose of granting letters of administration, in Baltimore City, and this residence, as to his widow, was not changed by her remaining in Baltimore County until her death, because she was in such condition of mind, as to be incapable of having or manifesting an intention to change her residence."

In other jurisdictions there are recognized exceptions to the rule referred to, which are held to apply to cases where the wife has been abandoned by the husband or she has been forced by brutal treatment to leave him and to establish a domicile for herself, and to divorce cases. 14 *Cyc.* 847: *Jacobs on Domicil*, secs. 223-227. But these exceptions have no application to the facts of this case, and we are not to be understood as giving them our approval. Here there is no evidence of brutal treatment or abandonment on the part of the husband.

The Orphans' Courts of this State, in exercising the jurisdiction conferred upon them by the above mentioned section and granting letters of administration, are necessarily authorized and required to determine the residence of the deceased at the time of his death, and their decisions cannot be reviewed in collateral proceedings. *Raborg v. Hammond*, *supra*; *Shultz v. Houck*, *supra*; *Stanley v. Safe Deposit Co.*, *supra*. The appellant contends that the Orphans' Court of

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Carroll County and the Orphans' Court of Baltimore City, upon application for letters of administration upon the estate of the deceased, had jurisdiction to determine the question of her residence at the time of her death, and that the jurisdiction first invoked was exclusive. He relies upon the well established rule, "that when two Courts have concurrent jurisdiction over the same subject matter, the Court in which the suit is first commenced is entitled to retain it, and the other co-ordinate Court has no authority to interfere, and will as soon as judicially informed of the pendency of the prior suit, dismiss the subsequent proceedings." *Brown v. Wallace*, 4 G. & J. 497; *Brooks v. Delaplaine*, 1 Md. Ch. 354; *Dunnock v. Dunnock*, 3 Md. Ch. 150; *Withers v. Denmead*, 22 Md. 145; *Albert v. Winn*, 7 Gill, 446; *Jenkins v. Sims*, 45 Md. 537; *B. & O. R. R. Co. v. Flaherty*, 87 Md. 123; *Wright v. Williams*, 93 Md. 70; *Preston v. Poe*, 116 Md. 1; *Gerke v. Colonial Trust Co.*, 117 Md. 579. But even if it be conceded that the rule applies to the jurisdiction exercised by the Orphans' Courts of this State under the section referred to, as to which we are not required to express an opinion in this case, it is quite clear it cannot avail the appellant in the case at bar. It was incumbent upon him to show that the jurisdiction of the Orphans' Court of Carroll County was the one first invoked, and all that the evidence shows is that formal applications for letters of administration were filed in the Orphans' Court of Carroll County and in the Orphans' Court of Baltimore City on the same day. Under such circumstances we clearly would not be justified in reversing the order of the Orphans' Court of Baltimore City refusing to revoke the letters previously granted for the reason urged, especially when it appears that that Court correctly decided the question of the residence of the deceased; and was therefore authorized by the Code to grant letters of administration upon her estate.

It follows from what we have said that the order appealed from must be affirmed.

*Order affirmed, with costs.*

J. FURR WHITE

vs.

PHILIP D. LAIRD ET AL.

*Election laws: primary elections: marking ballots; "black lead pencils." Supervisors of elections: appeals from judges of election; jurisdiction and discretion. Mandamus: when writ will not be issued.*

The requirement of section 185 of Article 33 of the Code, that election ballots shall be marked with a black pencil, are not violated by marking them with a black indelible pencil. p. 126

The powers and jurisdiction, given to the Supervisors of Elections by section 199 B of Article 33 of the Code, to hear and determine appeals from the action of judges of election, etc., require them to exercise judgment and discretion, and to act in a quasi-judicial capacity. p. 123

In the absence of improper motives on the part of the Supervisors, no appeal lies from their decisions in matters over which they have control; nor will a writ of mandamus be issued to control their action. pp. 129-132

*Decided December 2nd, 1915.*

Appeal from the Circuit Court for Montgomery County.  
(URNER, C. J., and WORTHINGTON, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON and STOCKBRIDGE, JJ.

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*T. Howard Duckett* (with whom was *Marion Duckett* on the brief), for the appellant.

*Charles W. Prettyman* and *James Dawson* (with whom were *Thomas Dawson, Talbott & Prettyman* and *J. Dawson Williams* on the brief), for the appellees.

• .     BORD, C. J., delivered the opinion of the Court.

The appellant and the appellee, Philip D. Laird, were candidates for nomination for the House of Delegates from Montgomery County on the Democratic ticket at the primary election held in that county on the 14th of September, 1915. The Board of Canvassers certified that the appellant received 1946 votes and Mr. Laird 1955 votes—three other candidates having more votes than they, and the contest being between them for the fourth place, as that county was entitled to four delegates. The appellant filed a petition with the Supervisors of Elections, asking that the ballots cast be recounted and recanvassed, and on September 24, 1915, the Supervisors, sitting for the purpose of recounting and reviewing said ballots and acting under section 199-B of Article 33 of the Code, proceeded to recount and recanvass the ballots cast at said primary election for the appellant and the appellee, Laird, and they determined that Mr. Laird had a majority of three votes. The appellant filed a petition for a *mandamus* to compel the Supervisors of Elections to reject 120 ballots which they counted and to count four which they rejected and to declare the result of the election accordingly.

A demurrer was filed to the answer of the Supervisors, and a motion to quash part, and a demurrer to the other parts of the answer of Philip D. Laird were filed. In the answer of Mr. Laird there was a demurrer to the petition, questioning the authority of the Court to grant a *mandamus* upon the case stated in the petition. The lower Court passed an order sustaining the demurrer of Mr. Laird and dismissing the petition. From that order this appeal was taken.

In the case of *Foxwell v. Beck*, 117 Md. 1, it was decided that the primary election law did not provide for a contest over a nomination. That case was decided November 22nd, 1911, and by an Act approved January 10th, 1912, provision was made for an appeal to the Supervisors of Elections, and for a recanvass and recount of the ballots cast. Section 160-Y, Chapter 2 of Laws of 1912, being 199-B of Article 33 of Code (Vol. 3).

The two acts of the Supervisors relied on in the petition as the ground for the mandamus are: 1st. That the Supervisors counted 120 ballots (64 of which were marked for Laird and 56 for White) which were not marked with a black lead pencil, but with an indelible pencil; and 2nd. That they rejected four ballots not defective upon their face, three being for petitioner and the other blank as to them.

The lower Court based its order on the ground that "the authority conferred by the law upon the Board of Supervisors for conducting and determining such appeals as the one instituted by the present petitioner clearly involves the exercise of judgment and is consequently not a proper subject for revision or regulation in a *mandamus* proceeding." The statute (sec. 199-B of Art. 33) gives the right of "appeal from and review of the action and decision of the judges of election in counting ballots and for a recanvass and recount of the ballots cast," etc., and the Supervisors are "given jurisdiction and power to hear and determine said appeals; to review and correct the action of the judges of election in their respective jurisdiction and to recanvass, recount and certify said result of said primary election. And for all the purposes of said review, recount, recanvass, etc., the said Supervisors of Elections shall act and be judges of election for counting said ballots, acting as such in the premises within their respective geographical jurisdictions." It further provides that the Supervisors shall "produce before them the ballot-boxes, returns, tally sheets and paraphernalia of said election and shall proceed forthwith in a summary way without answer, pleading or technicality, and without

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requiring any evidence to be taken or proof submitted, to review the actions of the judges of elections and recount the ballots in the precincts named in said petition," etc., and "said review, recount and recanvass shall be had with all possible expedition and dispatch and in preference to all other business under such mode of procedure as the Supervisors of Elections shall prescribe by means of tellers appointed by them on the recommendation of and with equal representation to the opposing candidates. The said Supervisors to pass upon and decide whether any ballot contested by the tellers for either side shall be rejected or counted."

In section 185 of Article 33 there are provisions governing the judges of elections in reference to the count, and it is provided amongst other things, that "the intention, so far as the same may be ascertained from each ballot itself, shall, in the absence of any unlawful or fraudulent mark or device thereon or enclosed therewith or on the envelope containing the same, prevail."

There would seem to be no room to doubt that the Supervisors are called upon and required to exercise judgment and discretion in the discharge of their duties and act in at least what is called a *quasi* judicial capacity. Anyone who has had experience in contested elections in Courts knows how difficult it often is to determine whether a particular ballot shall or shall not be counted under existing statutes—sometimes requiring the closest scrutiny of the ballots and marks, and demanding the very best judgment the Court is capable of exercising. Other references to statutes might be made to show that the duties of the Supervisors are far from being merely ministerial. In order to grant the *mandamus* the Court would have been compelled to substitute its judgment for that of the Supervisors, as to whether the 120 ballots should be rejected, or the four ballots counted. The Supervisors saw and examined them, in the presence of the tellers and counsel of the parties, and they were required by the statute "to pass upon and decide whether any ballot con-

tested by the tellers for either side shall be rejected or counted."

It may be well to more specifically state the questions the Supervisors were called upon to decide, as shown by the pleadings. We will first consider the 120 ballots. The petition alleges: "That at said session and during all of said recount and recanvass, your petitioner, by counsel, objected to certain ballots being counted to the number of one hundred and twenty (120), sixty-four (64) of which were marked for the said Laird, and fifty-six (56) of which were marked for your petitioner, upon the ground that said ballots so protested were not marked as required by law with a black lead pencil, said ballots being marked otherwise legally for the said Laird or for your petitioner with a pencil other than a black lead pencil, as required by law, namely, with indelible pencil."

The respondent Laird, in his answer, states that, "there were a number of ballots protested by the tellers both for the contestant and this respondent, for various reasons, and that in each case the protest was heard and determined by the Board of Election Supervisors, as by law they were required to do, and said ballots so contested were counted or rejected in accordance with the findings of said board in each particular case. He admits that in some instances the reason given for the protest on the part of the tellers for the said J. Furr White, contestant, was that said ballots had been marked by an indelible pencil, but this respondent does not admit that the marking of said ballots was so done or that that was a material or proper reason for the rejection of said ballots, but this respondent does not know the number of ballots contested for this reason, nor how many of them were cast for either of the parties to said contest, nor does he esteem it a material fact, as the Board of Supervisors had by law, in each instance, the right and power to decide as to whether or not such votes should be counted and did in fact, upon each of said protests, decide the questions so presented to them."

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The Supervisors in their answer "admit that counsel for petitioner objected to certain ballots being counted (the exact number of which is unknown) upon the ground 'that said ballots were marked with an indelible pencil and not with a black lead pencil as required by law.' These respondents deny that said ballots were counted contrary to law and in derogation of the rights of the petitioner, but aver that on inspection and passing upon said ballots the respondents, the said Board of Supervisors of Elections, determined them to be properly marked and voted, and that the marks appearing on said ballots were not distinguishable from black pencil marks, as was their duty so to determine. These respondents further deny that the pencils used by the voters in marking said protested ballots were of a character different from that required to be, or in plain violation of the purpose and intent of the law, but aver and charge that no vote was counted for any of the contesting candidates, after whose name a cross-mark made with a black pencil did not appear."

Section 185 of Article 33 provides that after the voter obtains his ballot, "he, the voter, shall thereupon retire to one of the booths provided for the purpose, taking with him said blank ballot, and shall there with *black pencil*, and in the manner required by law, prepare such official ballot for voting." At the end of that section there are these provisions: "If in Baltimore City or in any county more names are marked for any office than there are persons to be voted for, such ballots shall not be counted for such candidates or delegates, or other persons to be voted for, as the case may be; but the whole ballot shall not for that reason be rejected for candidates for other offices or positions, if any, and a ballot marked by any other than a *black lead pencil* shall not be counted. No vote shall be counted in any such county for any person, after whose name a cross-mark made with a *black pencil* does not appear on the ballot when voted."

It will thus be seen that the voter is directed to mark his ballot when he retires to the booth "*with black pencil*," and

if he has previously prepared his ballot the statute does not in that part of the section say with what kind of pencil it shall be marked. While it does later say "a ballot marked by any other than a black lead pencil shall not be counted," it in the very next sentence states "No vote shall be counted in any such county for any person after whose name a cross-mark made with a *black pencil* does not appear on the ballot when voted." If any distinction between the two was intended, it might be argued that in the counties only a "black pencil" was intended to be required," but when the statute itself used the term "black pencil" twice, and in so many words directs the voter to mark his ballot with a "*black pencil*," can it be possible that votes (in this case to the number of 120, according to the appellant) are to be rejected because they are not marked with a "*black lead pencil*," although they were marked with a "*black pencil*"? Is the voter required to have a chemical or some kind of analysis made, to ascertain whether his "black pencil" is a "black lead pencil," in order to be sure of his vote? Is he to inquire of the election officials whether the pencils they have provided, and are in the booths, are "black lead pencils"? Inasmuch as the General Election Laws provide that the voter shall mark his ballot with an "indelible pencil," and it is well known that there is little, if any, lead in what we ordinarily call "lead pencils," and it is not shown that there are not indelible pencils which (at least unless moistened) make as black marks as the ordinary pencils in use, it might have a tendency to cause the average voter to believe that the primary election law of Maryland is a snare and delusion, rather than a method of obtaining honest nominations, if Courts must hold ballots to be invalid for such reasons. But as, in our judgment, it is not for us to determine the question in this case, we leave the above inquiries and suggestions without further comment or answer. All we need now say is that it was under the circumstances clearly and unquestionably a matter for the judgment and determination

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of the Board of Supervisors, and their conclusion thereon was not subject to review by the Court.

In reference to the four ballots rejected, the petition alleges, "that while the respondents, the said Board, were engaged in the recount of the Democratic ballots for the Second Precinct of the 13th (Wheaton) District, and after all but six of the ballots in the Democratic ballot box had been passed upon by the respondents and counted or rejected, that six (6) ballots found to be separately strung and tied were objected to by counsel for said Laird because of the fact that they may have been rejected by the judges of election, and upon examination by the Board of Supervisors it was found that two (2) of said ballots were plainly and manifestly wrongfully marked and ought to have been and probably were rejected by the judges of election, but nothing was discovered upon the other four (4) said ballots to indicate that they were open to any objection or that they were not legal ballots legally cast and entitled to be counted; that none of said ballots were marked rejected, defective or spoiled, nor was there any indication upon any of them as to the action of the judges of election, and that notwithstanding that your petitioner insisted that said ballots should be passed upon by said board, and counted or rejected as they might appear upon their face, the board, without reviewing said ballots, but after an inquiry of one of the judges of election, rejected all of said six (6) ballots; that of the four (4) ballots not defective upon their face, three (3) were cast and should have been counted for your petitioner, the fourth being blank as to both your petitioner and said Laird," etc.

The Supervisors answered by saying that they deny "that after discovering the six ballots which were separately strung and tied and contained in the ballot box of the Second Precinct of the Thirteenth District, they illegally and in derogation of the petitioner's rights rejected said ballots, but aver and charge that after they had counted all of said ballots in said box which were properly marked there were in a package separately strung and tied together six ballots two of

which were spoiled and properly rejected. That the counting of the four remaining ballots was objected to on the part of the respondent Laird because the fact that they were contained in the separate package with two ballots manifestly wrongfully marked rendered it reasonably certain that the judges of election for said precinct had for certain reasons rejected said ballots. Whereupon after hearing both the petitioner and the respondent Laird, it was suggested that inquiry be made of the judges of election for said Second Precinct of the Thirteenth District, which was entered into and agreed upon by the counsel for both sides; and that these respondents accompanied by counsel for both petitioner and the respondent Laird, visited one of the judges of election of said precinct, then sitting as officer of registration in said precinct, and were by him informed of the exact number of spoiled and rejected ballots to be found in said box, namely, two that were spoiled and defective and four that were erroneously delivered to Republicans on the day of the primary and by them attempted to be voted, but were refused; and were further informed that the total number of spoiled and rejected ballots, numbering six in all, were tied in a separate package and strung with the other ballots in said box, all of which tended to substantiate the objections of the respondent Laird. That before passing upon said four ballots these respondents again returned to the Court House in Rockville, where said recanvass was being conducted, and upon further consideration, and after determining in their own minds whether or not said ballots should be counted, and exercising the discretion vested in them, rejected said ballots." The answer of Mr. Laird is to the same effect.

It is true that the appellants sought to have the action of the Supervisors as to the four ballots reconsidered, and filed a petition together with some affidavits to sustain the contention that the Supervisors had been misinformed or misunderstood the facts as to said four ballots, but without deciding whether they could legally reopen the case after they had finished the recount, etc., and certified the result, their an-

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swer shows that the petition was set down for hearing and after hearing arguments by counsel on both sides they denied the petition. Without meaning in any way to reflect upon any of these gentlemen, or undertaking to decide between them, there was certainly some ground, not to say strong ground, to cause the Supervisors to hesitate to reopen the case, even if they could legally have done so. Neither of the two judges of elections, whose affidavits were filed, attempt to give any explanation as to why the four ballots were separately strung and tied up with the two ballots, which were confessedly invalid, all of which were admitted to have been found in the Democratic ballot-box. Nor does either of them assign any reason why the four Democratic tickets were placed in the Republican box, as they claim was done with the four tickets obtained by the four Republican voters and then taken from them. The Democratic judge was the one whom the Supervisors and the counsel of the parties interviewed, and his affidavit is in direct conflict with what the Supervisors state in their answer, which was sworn to by the three, occurred in the interview with that judge of election. We speak of these things simply to show that their refusal to reopen the case cannot be said to have necessarily been unreasonable, arbitrary or for improper motives—regardless of the more important question as to their power to do so. If they had the power to reopen the case, it was at least in their discretion not to do so, under such circumstances as we have stated, especially when the great danger of adopting such a course, when the result is as close as it was in this case, is considered. The Supervisors were unquestionably required to pass on those ballots and did so. If the position of appellant be correct, then it matters not which way they decided, the losing party could have asked the aid of the Court, although no appeal is provided for. For if the appellant was entitled to a *mandamus* to require the Supervisors to count them, then, if they had been counted, the appellee Laird might have had the right to a *mandamus* to require them to reject, or not count them. It cannot be said

that there was a failure or refusal to act, for they did act and passed judgment on them, and, even if it be conceded that they were not compelled, or even authorized to go to the registration office of the precinct to see the judge of election, they did so with the consent of the attorneys of the appellant and appellee, Laird. But even if they had not obtained such consent, how that can furnish any ground for a *mandamus* we are at a loss to know.

It is not correct to say, "that there was no indication anywhere from anything found in the ballot box that they were not legal ballots." The fact that the six ballots were "found to be separately strung and tied," and that two of them "were plainly and manifestly wrongfully marked and ought to have been and probably were rejected by the judges of election," as the petition alleges, or "were in a package separately strung and tied together," as the answer of the Supervisors states, or "there were in a package to themselves tied together and separated from the other ballots six ballots, two of which were on their faces spoiled and improper to be counted," as Mr. Laird's answer says, naturally suggested that they were for some reason different from those which were strung together, and counted by the judges of election, especially as that box did not have an envelope or package containing spoiled or rejected ballots. The Supervisors were evidently endeavoring to obtain the best information they could, and there is no suggestion of any fraud or intentional wrongdoing on their part. When they found the four ballots with two confessedly invalid ballots, they certainly had the right to seek some explanation, and by the very terms of the statute they were required to pass upon and decide whether those ballots contested by the tellers of the one side should be rejected or counted. It is not for the Court to determine whether they were right or wrong in their determination, any more than it would have been as to any other contested ballots. There may have been other ballots counted or rejected for the one or other of the two candidates concerning which the Court might differ with them, but that would not

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justify a *mandamus* to require them to decide as the Court might think they ought to have decided. We express no opinion as to whether their conclusion was right, but hold that even if it be conceded they were wrong in making the inquiries they did, and as they did, that of itself would not justify the Court in issuing a *mandamus*, as it was merely an irregularity and they in point of fact passed on the ballots and there was unquestionably some ground for the conclusion they reached. If the question could thus be opened up, then the other side might ask for a *mandamus* for some other irregularity, and so the proceedings could be involved in such delay as would endanger the right of whichever one was entitled to be the nominee of his party to have his name placed on the ticket in time. Such delays are not contemplated, or authorized by the statute.

The case of *Miles v. Stevenson*, 80 Md. 358, is much relied on by the appellant. Stevenson was appointed Supervisor of certain public roads, for two years and until his successor was appointed and qualified. The statute only gave the County Commissioners the power to remove a road supervisor during the term "for incompetency, wilful neglect of duty, or misdemeanor in office." This Court said: "In the case at bar the cause alleged was not one of those set forth in the statute, and for that reason the County Commissioners' act in removing the relator was a nullity. The order removing him was passed *ex parte*, without notice to or a hearing of the relator, and for that additional reason was utterly invalid." That was therefore a wholly different case from this, and there is nothing in the opinion which can sustain this application for a *mandamus*. The well established doctrine "that the writ of *mandamus* does not lie to control the discretion of any tribunal, however limited its jurisdiction may be" was repeated, and none of the exceptions to the rule mentioned are applicable here. The case of *Price v. Ashburn*, 122 Md. 514, was also a totally dissimilar case. There the Board of Canvassers refused to canvass the returns of an election district, which the law required them to

canvass. It was said by JUDGE BRISCOE: "It has been repeatedly held, that the duties of canvassing officers are purely ministerial and, under the facts of this case, the canvassers could only canvass and declare the result as shown by the returns."

We do not quite understand the theory of appellant, that independent of his right to an ordinary *mandamus*, he was entitled to relief under section 86 of Article 33. That section applies to the Board of Canvassers, and while it is true that Board is composed of the Supervisors of Election, they organize specially as a Board of Canvassers for the purposes mentioned in the statute—being required to elect a chairman and secretary from their number, and each member is required to take the oath of office prescribed. Their powers are wholly different from those conferred on them as Supervisors of Election by section 199-B. Moreover, this was an application for a *mandamus*, and not for such relief as section 86 affords, when applicable.

As no application was made to amend the petition and prayer, as was suggested by the separate opinion of JUDGE WORTHINGTON he thought might be done, and as he concurred in the order appealed from, we have not thought it necessary to determine the point suggested by him.

Being of the opinion that no sufficient ground was shown by the record to justify the Court in interfering with the exercise of the judgment and discretion reposed in the Supervisors of Election of Montgomery County, we affirmed the order appealed from by a *per curiam* order dated October 21st, 1915.

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Syllabus.

MARY C. JERVIS

vs.

CHARLES A. JERVIS ET AL.

*Deeds: voluntary; prima facie void; burden of proof; effect of—; when presumption overcome.*

While a gift obtained by any person standing in a confidential relation to the donor is *prima facie* void, and the burden is thrown on the donee to establish to the satisfaction of the court that it was the free, voluntary and unbiased act of the donor, yet when that burden is discharged, and there is no question of capacity or undue influence, a court will not strike down a voluntary deed merely to gratify the caprice of the grantee, or because of subsequently changed relations between the parties.

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*Decided December 1st, 1915.*

Appeal from Circuit Court No. 2 of Baltimore City.  
(HEUISLER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, UNER, STOCKBRIDGE and CONSTABLE, JJ.

*Robert F. Leach, Jr.* (with whom was *John B. Keplinger* on the brief), for the appellant.

*W. Thomas Kemp* (with whom was *Edwin J. Griffin* on the brief), for the appellees.

BRISCOE, J., delivered the opinion of the Court.

This is a bill in equity, to annul and set aside a deed of trust, executed on the 9th day of March, 1909, by the appellant, the widow of James Jervis, late of Baltimore City, deceased, to the appellee, Charles A. Jervis, as trustee, for certain purposes and trusts, specifically set out, in the deed.

The bill was filed on the 15th day of September, 1914, and in substance alleges, that the deed is without legal consideration, is fraudulent and void; that it was and is not her act and deed, because she was induced to believe at the time it was executed by her, that it was only for the purpose of properly administering and distributing her husband's estate, and that she at no time ever contemplated depriving herself of the interest, in her husband's estate as by the contents and purport of the deed, she has done. That unless the deed is vacated and annulled she will be deprived of all her rights, and property of every sort, to which she is entitled as the widow of her deceased husband, under the laws of the State, and cause a great hardship, injustice and wrong upon her.

The defendants, the trustee and the four grantees in the deed, are the children of James Jervis, deceased, the husband of the grantor by a former marriage, the appellant not having any children.

James Jervis, the husband, died intestate on February 26th, 1909, leaving surviving him the appellant, his widow and the defendants, who are his children by a former wife, as his only heirs at law.

The answer of the defendants denies the charge and allegation of fraud and misrepresentations upon which the plaintiff relies to obtain the relief sought by the bill, and avers that

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the deed was made voluntarily and executed by the plaintiff of her own free will, without any fraud, misrepresentation or undue influence whatsoever, with full knowledge of the contents and purport thereof, and was for a good and legal consideration, and is the lawful and valid deed of the plaintiff.

The property conveyed by the deed consists of the plaintiff's one-third interest as widow, which she received from her husband's estate, amounting to \$4,933.27, and distributed to her, by the first administration account, in the settlement of the estate in the Orphans' Court of Baltimore City.

By the deed, all of the grantor's property, of every kind and nature, is conveyed, in trust and confidence, for the uses and purposes and to the persons named therein, as follows:

"In trust to take over, collect, receive and hold all of said property and estate, moneys, credits, securities and evidence of debts and to pay over the rents, income, interest, revenue, profits and benefits thereof and therefrom, after paying the expenses of said property and of this trust to said Mary Jervise so long as she shall live, and from and after the death of said Mary Jervis the said Trustee shall pay and satisfy all her funeral charges and expenses (her burial to be made in Cedar Hill Cemetery, Anne Arundel County, Maryland, Lot 95, area H, sides of grave from the bottom to the height of casket or coffin to be lined with hard brick with a covering of stone slabs no box or wood covering to be used) and said Trustee shall make provision and pay for the perpetual care of said cemetery lot. And in further trust from and after the death of said Mary Jervis as to all other parts residue and remainder of said trust estate and property the same shall go to and become the property and estate in equal shares (one-fourth to each) of Ella F. McNally Cora Busick Charles A. Jervis and John E. Jervis the four children of the said James Jervis (late husband of said Mary Jervis). And should any of said children die before the death of said Mary

Jervis then the share of the one so dying shall go to his or her heirs and legal representatives *per stirpes*. And the said Charles A. Jervis Trustee as aforesaid is hereby authorized and empowered prior to the death of said Mary Jervis whenever to the said Trustee it may seem to the benefit of the said trust or of the beneficiaries thereof from time to time to sell and dispose of said trust estate and property or any part thereof for the purpose of changing, altering and re-investing the same and the purchaser or purchasers shall not be required to see to the application or reinvestment of any purchase money."

The prayer of the bill is that a decree be passed annulling and vacating the deed in question and for general relief.

The case was heard upon bill, answer and proof in the Court below, and from a decree dismissing the plaintiff's bill this appeal has been taken.

At the trial of the case, there were three witnesses examined upon the part of the plaintiff and six produced by the defendants, but we shall not refer in detail to their testimony, but shall state the conclusions we have reached after a very careful consideration and examination of the record now before us.

The case briefly stated is this: The appellant is a widow, without children. She is on or about sixty years of age, and married the father of the appellees in 1879. After the marriage she lived with her husband and his children at their home, 1105 Battery avenue, in Baltimore City, where her husband conducted the business of making oyster knives. Upon the death of her husband, in 1909, she continued to live at this home which belonged to the appellees until some time in 1913, when she left, and since that date boarded with her sister, Mrs. Rebecca L. Nevilles, her only near relative. The trustee has continued to pay her board and to otherwise care and provide for her while with her sister from the income of the trust estate. Shortly after living with her sister

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she changed her attitude and relation towards the appellees, and without notice to the trustee instituted these proceedings to vacate and set aside the deed for the alleged reasons stated in the bill.

It appears that from March 9th, 1909, the date of the deed, until September 5th, 1914, the date of the filing of the bill, she received the income from the trust estate, accepted the care and attention of the trustee and the Jervis family without objection and with apparent satisfaction.

It is admitted that she was an illiterate woman, unable to read and write, could not count money and did not appreciate its value. There is no question raised as to her mental capacity, and it is practically conceded that at the time she executed the deed she was entirely capable of making a valid deed or contract.

She owned no property of her own, and her husband in his lifetime frequently expressed to his children great anxiety and solicitude for the care and maintenance of his wife. From certain memoranda found among his papers, after his death, he thus expressed himself, "As my wife can not read or write, I wish it so arranged that some person to pay my wife a sum weekly."

The deed of trust was prepared by the family attorney, after a family conference, and the proof shows that the disposition of the property was not only such as she voluntarily determined to make, but according to the expressed wish of her husband that her property should be "so arranged" that she would be protected in its use and have the benefit of it in her lifetime.

The deed was read to her and its provisions explained in detail, not only at a family conference but by the Justice of the Peace before whom she signed and acknowledged it. It was executed in the presence of the family and her mark was witnessed not only by the Justice of the Peace, but by another who was present for the purpose. All of the defendants' witnesses testified that the deed was read and explained

to her; that she understood its contents; that it was "what she wanted," and that she was perfectly satisfied with its provisions.

The witness Butler, who heard the deed read to her on two occasions, testified: "Q. Now, when the Justice of the Peace came did he read the deed to her? A. Yes, sir; he read it the second time. Q. Did he explain it to her? A. Yes, sir. Q. Was she satisfied? A. Perfectly satisfied, and afterwards came on the outside and crowed about it—pardon me for using the slang—bragged about it, and said, Now, Charlie will look after me for the rest of my life."

The plaintiff, we think, has failed to establish the charge of fraud, misrepresentation or undue influence made in her bill. The evidence, on the contrary, shows that the execution of the deed was the free and voluntary act of the grantor, with a full knowledge of its contents and a full understanding of its provisions.

We can discover nothing in the proof or in the decisions of the courts, upon the facts of this case, that would justify a court in striking down this deed.

The legal principles applicable to cases of this character have been announced and considered in a number of recent cases in this Court. In *Reed v. Reed*, 101 Md. 141, it is said: "A gift obtained by any person standing in a confidential relation to the donor is *prima facie* void, and the burden is thrown on the donee to establish to the satisfaction of the Court that it was the free, voluntary and unbiased act of the donor. This means, however, that if it was the free and voluntary act of the donor, a gift deed is as good as any other and must be measured by the same standard. It won't do to make such a conveyance, and, because the grantor should subsequently regret it, to come in and ask the Court to undo the act so deliberately done. Let the grantee once discharge the burden imposed upon him and overcome the *prima facie* case, the Court would never strike down the deed either to gratify the caprice of the grantor or because

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subsequently thereto the relations of the parties changed." *Bauer v. Bauer*, 82 Md. 244; *Rogers v. Rogers*, 97 Md. 573; *Kensett v. Safe Deposit and Trust Co.*, 116 Md. 530; *Henry v. Leech*, 123 Md. 446; *Von Buchwaldt v. Schlens*, 123 Md. 409; *Brown v. Fidelity Trust Co.*, 126 Md. 176.

Our conclusion, therefore, is that the defendants have fully met the burden of proof required of them in this case, and that the deed was the free, voluntary and deliberate act of the grantor, and there being no sufficient evidence to sustain the charge of fraud and misrepresentation alleged in the bill, the decree of the Court below must be affirmed.

The execution of the deed in this case was undoubtedly for the benefit and protection of the grantor, and we have no difficulty in holding under all the facts and circumstances as disclosed by the record that it was a proper and righteous transaction.

As was said by this Court in *Rogers v. Rogers*, *supra*: "Protection against oneself is sometimes more needed than against others, and when this is shown to be the case, it is our duty to extend to it if we can lawfully do so."

*Decree affirmed, costs to be paid out of the corpus of the trust estate.*

## HARRY MILLER

vs.

## THE HOME INSURANCE CO. OF NEW YORK.

*Fire insurance policies; inventories; "iron safe" clause; keeping of books.*

When the terms of a contract are clear and unambiguous, courts have no right to make new contracts for the parties, or ignore those already made by them, simply to avoid ensuing hardship. p. 146

An inventory is an itemized list or schedule of articles, usually including a notation of their estimated values. p. 144

A policy of fire insurance required the assured to take a complete inventory of the stock on hand at least once each calendar year; and unless such an inventory had been taken within 12 months prior to the date of the policy, it was provided that one should be taken within 30 days of the issuance of the policy; the policy further required the keeping of a full and complete set of books, and also contained the "fireproof safe" clause. The appellant purchased the goods constituting the stock in trade in a certain store; and at the time of so doing made a careful and detailed inventory giving his appraised valuations; this was made a short time before he assumed control, and before he took out the policy of insurance; the insured did not keep any books, nor did he keep the inventory in a safe, as required by the policy; the fire totally destroyed the goods a month or so later.

*Held*, that such an inventory was such a one as was required by the policy; and that the insured could not recover on the theory, that he had the right to make an inventory within 30 days of the delivery of the policy. p. 144

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Syllabus.

It was further: *Held*, that the failure to keep in a fireproof safe such inventory and the sets of books, as the policy required to be so kept, was a failure on the part of the appellant to do that which was proper for the protection not only of the insurer but of the insured. p. 147

It was further: *Held*, that since the failure of the appellant to produce the books and records that the policy provided for, was chargeable to his own default in the performance of his contractual duty, it was a bar to his recovery under the policy. p. 147

The neglect of an insured to become familiar with the terms of the policy which he seeks to enforce, does not relieve him of the binding effect of its covenants, in the absence of any evidence impeaching its validity. p. 147

*Decided December 1st, 1915.*

Appeal from the Superior Court of Baltimore City.  
(SOPER, C. J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Israel B. Brodie* (with whom was *Harry B. Wolf* on the brief), for the appellant.

*W. Calvin Chesnut* (of *Haman, Cook, Chesnut & Markell*), for the appellee.

URNER, J., delivered the opinion of the Court.

The policy upon which this suit was brought insured the appellant to the amount of one thousand dollars, against the loss by fire of his stock of general merchandise in his store at Harrisonville, Baltimore County. There was a covenant in the policy that the assured would take a complete itemized

inventory of stock on hand at least once in each calendar year, and unless such an inventory had been taken within twelve calendar months prior to the date of the policy, one should be taken in detail within thirty days of its issuance, otherwise the policy should be null and void from its date. It was further covenanted that the assured would keep a set of books which should "clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from the date of inventory as provided for in" the preceding clause referred to "and during the continuance of the policy," and that he would keep such books and inventory, and also the last preceding inventory, if such had been taken, securely locked in a fireproof safe at night, and at all times when the building mentioned in the policy was not actually open for business, or in some place not exposed to a fire which would destroy the building. It was stipulated that in the event of failure to produce such set of books and inventories for the inspection of the insurance company, the policy should become null and void, and such failure should constitute a perpetual bar to recovery on the policy.

The case was withdrawn from the jury at the close of the testimony offered by the plaintiff, which showed that he had taken an inventory of the merchandise in the store when he purchased the stock in trade, two weeks prior to the date of the policy in suit, but that he kept no books showing his purchases and sales, having merely noted in a little memorandum book the amounts of cash received, and that he made no provision, by keeping an iron safe or otherwise, for the protection of his papers from destruction by fire.

The policy was dated May 29th, 1913, and was delivered to the appellant two weeks later. The contents of the store were totally destroyed by a fire which occurred about noon on July 5, 1913. It was testified by the appellant that he was sitting in front of the building, after having waited on a customer a short time previously, when he noticed smoke

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coming through the screen door, and that upon opening the door he found the room so filled with dense smoke and flames that he could not enter. He stated that he had no knowledge as to how the fire originated. The loss was estimated in his claim at \$3,343.75. The goods and fixtures in the store at the time he acquired the business were sold to him for \$925, but he testified that he subsequently increased the stock by purchases aggregating about \$2,500. It appears that the total insurance procured by the appellant upon the merchandise and fixtures amounted to \$3,000, two additional policies for \$1,000 each having been obtained from other companies simultaneously with the issuance of the policy involved in the present action.

In support of his effort to recover upon the policy, notwithstanding his failure to keep a set of books showing the sales and purchases affecting the insured stock of merchandise, the appellant advances the theory that the inventory taken when he bought the business from his predecessor was not of the character intended by the covenant we have mentioned, and that no inventory of the kind contemplated by the policy having been taken within the calendar year prior to its date, the appellant was allowed by its terms the period of thirty days from the time of its issuance within which to make such an inventory and begin the keeping of books, and this period, it is argued, had not elapsed when the fire and loss occurred. The evidence in the record does not admit of the acceptance of this theory. It is clear from the appellant's own description of the schedule made by him at the time of his purchase of the store, that it had every feature which an inventory could be supposed to possess. It was a complete and itemized list of the various commodities embraced in the stock in trade, with quantities and values indicated in detail. The prices listed therein by the appellant were those representing in his judgment the worth of the corresponding articles as forming part of the general stock he was proposing to buy. Upon the basis of the schedule thus prepared he

purchased the stock and fixtures at a price closely approximating the value it disclosed. While it was made with a view to the purchase of the property and before the appellant had taken charge of the store, it was exactly the kind of an inventory that would ordinarily be expected to be made in the course of the business to meet the requirements of the contract of insurance. The appellant preserved this inventory until the time of the fire, and he could undoubtedly have relied upon its existence as a sufficient reason for not preparing another within thirty days after the policy was issued. According to its accepted definition an inventory is an itemized list or schedule of articles, usually including a notation of their estimated values; *Webster's New International and Century Dictionaries*; *Black's and Bouvier's Law Dictionaries*; 4 *Words and Phrases*, 3755. It is clear that the schedule of "stock on hand" in the store, made by the appellant on the occasion of his purchase, should be properly characterized as an "inventory" within the meaning of the provisions here involved.

In the case of *Penix v. American Central Ins. Co.* (Miss.), 63 So. 346, where the question we have been considering arose under somewhat similar conditions, it was held that a list, made by the assured, of all the goods, with their values, which were placed in the store when it was first opened for business, was an inventory within the intent of the Iron Safe Clause, and that as it had been made within a year before the date of the policy in suit, it was the duty of the assured, under the terms of the clause, to keep the books therein specified, without waiting to take another inventory within the thirty-day period.

The cases cited on behalf of the appellant upon this point differ in their facts from the one presented by this record, and they are not opposed in principle to the view we have expressed.

It having been ascertained that an inventory of the insured stock in trade was taken within the calendar year prior

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## Opinion of the Court.

to the date of the policy and within the purview of its provisions, the conclusion necessarily follows that it was the duty of the assured, as the policy expressly required in that event, to keep a set of books "during the continuance" of the insurance, presenting a complete record of the business, including purchases, sales and shipments. The importance of this and other provisions of what is commonly known as the "Iron Safe Clause" of insurance policies is plainly apparent and has been repeatedly emphasized. The effect of such a covenant, if duly observed, is to safeguard the interests of both parties to the contract. It provides a protection to the insurer against possible misrepresentation as to the quantity and value of merchandise for which indemnity is claimed, and it affords the assured a reliable and convenient method of ascertaining and proving the real extent of his loss. This Court has had occasion in two recent cases to consider Iron Safe Clauses which were identical in their phraseology with the one now before us, and the covenants they contain were held to be reasonable and desirable and to be enforceable according to their terms.

In *Joffe v. Niagara Fire Ins. Company*, 116 Md. 155, the insured stock of merchandise was burned while the shopkeeper and attendants were absent at lunch, the store being left unoccupied and with its door locked. The books of the business were in the store at the time and were lost in the fire. They were not kept in a fireproof safe while the store was closed on the occasion just mentioned, no such receptacle for the books having been provided. It thus appearing without dispute that, during a period when the store was "not actually open for business," the books were not protected by the assured in the manner prescribed by the covenants of his policy, the Court ruled that an action to recover the amount of the insurance could not be maintained. It was said, in the opinion delivered by CHIEF JUDGE BOYD, that the Iron Safe Clause "has been very generally recognized as valid and reasonable, and has been declared to be useful and

desirable, not simply for the insurer, but for the honest insured," and that "when the terms of a contract are clear and unambiguous, courts have no right to make new contracts for the parties, or ignore those already made by them simply to avoid seeming hardships."

The case of *Reynolds v. German American Ins. Co.*, 107 Md. 110, involved the application of the covenant in the Iron Safe Clause requiring the assured to take an inventory of the stock within thirty days of the issuance of the policy, unless one had been taken within twelve months before its date. No inventory having in fact been taken within the prior period, the assured was obligated to make one within thirty days after the policy was issued. This he failed to do, and while an inventory was prepared before the occurrence of the loss by fire for which the suit was brought, it was not taken until after the expiration of the time limited in the covenant. It was held that by the express terms of the policy it became null and void upon the failure of the assured to take an inventory within thirty days after its issuance, and that the subsequent preparation of an inventory could not have the effect of reviving the policy without the insurer's consent. The Court said that there was no ambiguity in the covenant, and no question of waiver involved, and there was no justification for setting aside the valid and reasonable terms of the contract "because the insured, subsequent to the thirty days, did what he was required to do within that time." The inventory was taken two weeks after the thirty-day period had expired, and it was contended that this was a substantial compliance with the provision of the policy on that subject. This contention was overruled, the Court holding that the taking of an inventory fourteen days after the policy had become null and void could not be regarded as a substantial performance of the duty it imposed.

The decisions of this Court to which we have thus referred are in accord with the general trend of judicial opinion in favor of the due enforcement of the Iron Safe Clause in

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pursuance of the intention of the parties as expressed in its provisions. 19 *Cyc.* 761, and cases there noted.

In the case presented on this appeal there has been a conceded failure to keep any books showing the current changes in the quantity and value of the stock caused by purchases, sales and shipments. The inability of the appellant to produce such books, after the fire, is not due to their accidental loss or destruction, without default or neglect upon his part, as in *Scottish Ins. Co. v. Keene*, 85 Md. 263, but to the fact that no such records were ever in existence. It was his plainly defined duty, as we have found, to keep the set of books specified in the policy *during its continuance*, and no effort was made to fulfill this obligation. The appellant testified that he was not aware of such a requirement in the policy, but his neglect to become acquainted with the provisions of the insurance contract which he is seeking to enforce can not relieve him of the binding effect of its covenants, in the absence of any evidence tending to impeach its validity. *Bakhaus v. Caledonian Ins. Co.*, 112 Md. 695. The failure of the appellant to produce the books for which the policy provides being chargeable to his default in the performance of his contractual duty to keep such records, there is no ground upon which we may properly refuse to enforce the covenant that the non-production of the books shall be a bar to recovery on the policy and shall render it null and void.

Other questions were raised in the argument, but their decision is not essential to the determination of the case.

*Judgment affirmed, with costs.*

## ALBERT A. BRAGER

*vs.*

## OLIVE VIRGINIA BIGHAM AND BARBARA E. FORD.

*Leases: for longer term than 15 years; right to redeem; purpose of statute; collateral agreements in leases.*

In general, a lease of a building carries with it the land upon which the building stands. p. 156

The redemption statutes, codified in Article 53, section 24, and Article 21, section 93, relating to the right of redemption of leases, relate to buildings as well as to land. pp. 155-156

Remedial statutes are to be liberally construed. p. 158

Chapter 371 of the Acts of 1914, affecting the right to redeem *business* leases, has no application to leases created before the Act went into effect. p. 159

In such a case the right of redemption was in the nature of a contract, and the vested right can not be defeated by legislation subsequent to the lease. p. 159

Where section 24 of Article 53 of the Code gives the right to redeem any lease for a longer period than 15 years, at any time after the expiration of five years *from date of such lease*, the time for redemption is to be reckoned from the *date* of the lease, and not from the commencement of the term. p. 160

The right of redemption of leases to which the law applies, for a sum of money equal to the capitalization of the rent reserved at a rate not exceeding six per centum, is a statutory right, and in legal contemplation the lease must be read as if this right were incorporated in it, and as if the parties had contracted with regard to such provision. p. 160

These rights of redemption were given for the benefit of the public, and not out of special consideration for the parties to the lease. p. 160

*Decided December 2nd, 1915.*

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Opinion of the Court.

Appeal from the Circuit Court of Baltimore City.  
(BOND, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER AND CONSTABLE, JJ.

*Randolph Barton, Jr.*, and *Aubrey Pearre, Jr.*, for the appellant.

*J. Wilson Leakin*, for the appellees.

BURKE, J., delivered the opinion of the Court.

The appellees are leasehold owners of the property known as No. 233 North Eutaw street in Baltimore City. The property is subject to an irredeemable annual ground rent of twelve dollars. On January 24th, 1888, John Plummer Bigham and others, the leasehold owners, leased the property to Joseph Sigmund. The lease recited that:

"The said parties of the first and second part do hereby lease unto the said Joseph Sigmund the three-story building, Number 233 N. Eutaw street, near Saratoga street, in the city aforesaid, said building fronting about 22 feet on the east side of Eutaw street, for the term of one year, commencing on the first day of December, eighteen hundred and eighty-seven, and expiring on the thirtieth day of November, eighteen hundred and eighty-eight, at the annual rental of twelve hundred dollars, payable in monthly installments of one hundred dollars each, on the first day of each and every month, and at the expiration of said term which occurs on the first day of December, eighteen hundred and eighty-eight, the aforesaid parties of the first and second part, his, her and their successors, executors, administrators and assigns, do and he and they do hereby lease unto the said Joseph Sigmund, the hereinbefore described premises for the term of ten years, commencing on the said first day of December, eighteen hundred and eighty-eight, and expiring on the thirtieth day of November, eighteen

hundred and ninety-eight (1898), at the annual rental of sixteen hundred dollars, payable in monthly installments of one hundred and thirty-three dollars and thirty-three cents (\$133.33) each, on the first day of each and every month during the continuance of this demise accounting from the first day of December, eighteen hundred and eighty-eight."

This lease was assigned to the appellant, Albert A. Brager.

Prior to its expiration, the lessors on March 7th, 1896, executed and delivered to Brager, who was then in possession of the premises under the assignment referred to, a new lease of the property for a term beginning *November 30th, 1898*, and ending *April 2nd, 1911*, at an annual rent of \$2,000.00.

On the 16th of March, 1901, the lessors and the appellant entered into a writing under seal called in the record a "lease and agreement." It referred to the lease of 1896 and to the fact that it would expire in April, 1911, and that it had been agreed between the parties that the said lease should be extended until *December 4, 1915*. It then provided:

"That in consideration of the premises and of the sum of one dollar, the said parties hereto do hereby extend the aforesaid lease of said premises until the fourth day of December, in the year nineteen hundred and fifteen (1915), such extension to be subject to all of the terms, conditions and stipulations contained in said original lease dated the seventh day of March, eighteen hundred and ninety-six, and recorded as aforesaid among the Land Records of Baltimore City in Liber. R. O. No. 1607, folio 195, etc. And it is hereby agreed that if the said Brager should tear down the present building on said premises and erect another in its place, at said Brager's expense, said Brager hereby agrees to pay the yearly increase of taxes over and above the present assessment on the valuation of said property if such increase of assessment is caused by reason of the erection of said new

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building by said Brager, it being understood, however, that said Brager shall not be prejudiced hereby by reason of an increase of the tax rate in Baltimore City."

On February 23, 1906, the lessors granted to Brager, his personal representatives and assigns, "the right and option of a lease of the premises known as number 233 North Eutaw street, in Baltimore City, for the term of years commencing on the fourth day of December, nineteen hundred and fifteen (1915), and to continue for the period of twenty (20) years thereafter, said lease to be subject to all of the terms, conditions and stipulations contained in an original lease between the parties hereto (and Frank R. Ford, who is now deceased), dated the seventh day of March, 1896, and recorded among the Land Records of Baltimore City in Liber R. O. No. 1607, folio 195, etc., with the exception of the giving of bond and with the exception of the increase of rent as herein set forth." In consideration of the execution of this option Brager agreed to pay a rental of twenty-one hundred dollars per annum instead of two thousand dollars as provided in the extension of the lease dated March 16, 1901.

Brager was required to avail himself of the option within a period of thirty days from its date, and he did avail himself of the option within the time limited, and on March 16, 1906, a new lease and agreement were executed. The portions of this instrument, which is necessary for the purposes of clearness to quote, are as follows:

"This lease and agreement, made this sixteenth day of March, in the year one thousand nine hundred and six, by and between John Plummer Bigham, substituted trustee of the will of John Bigham, deceased, of Baltimore City, in the State of Maryland, party of the first part, and John Plummer Bigham, of the City of Baltimore, in the State of Maryland; Olive Virginia Bigham, of the City of Baltimore, in the State of Maryland, and Barbara E. Ford, of Fairfax,

Fairfax County, in the State of Virginia, parties of the second part, and Albert A. Brager, of the City of Baltimore, in the State of Maryland, party of the third part. Whereas, the said Albert A. Brager, on the seventh day of March, in the year eighteen hundred and ninety-six, leased from the parties of the first and second parts (and Frank R. Ford, now deceased), the premises known as number 233 North Eutaw street, in Baltimore City, which said lease continues until the second day of April, in the year nineteen hundred and eleven, said lease being recorded among the Land Records of Baltimore City in Liber R. O., No. 1607, folio 195, etc.; and whereas on the sixteenth day of March, in the year one thousand nine hundred and one, the said named parties executed to the said Albert A. Brager a lease on said premises known as number 233 North Eutaw street, in Baltimore City, for a term of years commencing on the second day of April, in the year nineteen hundred and eleven, and ending on the fourth day of December, in the year nineteen hundred and fifteen; and whereas the said parties of the first and second parts have agreed to execute a new lease to the said Albert A. Brager on said premises known as number 233 North Eutaw street, in Baltimore City, subject to the terms and stipulations hereinafter set forth.

“Now, therefore, this agreement witnesseth, That for good and valuable considerations, the said parties of the first and second parts do hereby demise and lease unto the said Albert A. Brager, his personal representatives and assigns, the building and premises in Baltimore City, known as number 233 North Eutaw street, for the term of years commencing on the fourth day of December, in the year nineteen hundred and fifteen, and ending on the third day of December, in the year nineteen hundred and thirty-five, at the rental of twenty-one hundred dollars (\$2,100.—) per annum shall be payable monthly in even and equal installments of one hundred and seventy-five dollars

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(\$175.—) each on the fourth day of each and every month during the continuance of this lease. \* \* \*

"Said Brager hereby agrees that between this date and the fourth day of December, in the year nineteen hundred and fifteen, he will tear down the present building on said premises and erect a new building thereon, at his, the said Bragers own cost and expense, said new building to cost not less than the sum of twenty thousand dollars (\$20,000). And it is agreed that if the said Brager should not tear down the present building on said premises, and erect a new building thereon as aforesaid, between this date and the fourth day of December, in the year nineteen hundred and fifteen, he will pay to the said John Plummer Bigham, substituted trustee of John Bigham, deceased; John Plummer Bigham, Olive Virginia Bigham and Barbara E. Ford, the cash sum of ten thousand dollars (\$10,000), on the fourth day of December, in the year nineteen hundred and fifteen, if he does not erect said building, which sum of ten thousand dollars (\$10,000) shall be in lieu of the liability of said Brager to erect said building."

The appellant, claiming the right to redeem and extinguish the rent reserved in the lease of March 16, 1906, gave the required notice of one month to the landlords and lessors of his desire to redeem, and tendered the sum of \$35,000.00, —that being the sum of money equal to the capitalization of the rent reserved at six per cent.—and all accrued rent, and demanded from the appellees the execution of a deed at his expense. They declined to execute and deliver a deed for the premises. The appellant thereupon filed in the Circuit Court of Baltimore City the bill in this case, in which he prayed, "that said defendants may be required by a decree of this Court to execute and deliver unto your Orator a deed of the lot hereinbefore described, under the provisions of Article 53, Section 24, and Article 21, Section 93, of the Code of Public General Laws of Maryland, to the end that said annual rent of \$2,100 shall be eliminated."

The answer of the appellees admits the title of the plaintiff under the leases and agreements mentioned, and they also admit the service of notice given by the plaintiff of his desire to redeem, and that they refused to execute a deed for the premises. They alleged that the paper writing dated March 16, 1906, was an agreement to lease a house to be erected by the plaintiff prior to December 4th, 1915, for a period of twenty years from said last mentioned date, and that until said date arrived it was a mere agreement to lease in the future, and was not a lease or sub-lease within the meaning of the Acts of Assembly; that it does not profess to be a lease or sub-lease of a *lot of ground*, but only of a *house* to be built by the plaintiff. The answer then sets forth the provision, quoted above, of the lease and agreement of March 16, 1906, by which Brager obligated himself to erect a new building, to cost not less than \$20,000, prior to December 4th, 1915, or in case of failure to do so to pay in cash to the lessors the sum of ten thousand dollars, and alleged that the "attempt by the plaintiff to redeem the said rent without either building for twenty thousand dollars or paying cash of ten thousand dollars, the consideration of said paper, is a gross fraud upon the said agreement, and will not be countenanced in a Court of Equity, which requires everyone applying to it for assistance to do equity." The seventh and eighth paragraphs are here quoted:

"7. These defendants show that the various acts mentioned and collated in Article 53, section 24 of the Code, are all on *pari materia*, and all intended to express a public policy against the continuance of long leases, but nowhere to do, as this present bill attempts to, cut up a rent before the same has gone into effect. The present rent is for 20 years from December 4, 1915, and if the prayer of the bill is granted, will be 'redeemed' before it ever had any existence, and without paying the consideration of said lease above mentioned, contrary to equity and good conscience.

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"8. By Act of Assembly, 1914, Chapter 371, it is provided that the several Acts of Assembly relied on by the plaintiff 'were not intended to apply and do not apply to leases or sub-leases of property leased for business purposes \* \* \* where the term of said leases or sub-leases, including all renewals thereof provided therein, shall not exceed 25 years.' That said Act took effect April 10, 1914, and therefore conclusively prevents the relief prayed for."

The case was heard in the Court below on bill, answer and exhibits, "as if the answer were a demurrer."

The lower Court, in a carefully prepared opinion, held this lease to be a building lease, and further held that the statutes of the State providing for the redemption of ground rents did not apply to building leases, and for that reason by its decree of July 3, 1915, dismissed the bill of complaint, and from that decree the plaintiff has brought this appeal.

It is, we think, perfectly clear, both from the terms of the option to lease dated February 23, 1906, and from the language employed in the lease and agreement dated March 16, 1906, that the latter instrument was precisely what the parties intended it to be, viz, a lease of the "building and premises" in question for a term of twenty years, with a reserved annual rent of \$2,100.00,—the term to begin on the fourth day of December, 1915,—said lease containing also certain agreements of the parties, one of which we have above transcribed.

It is true that the lease may be properly called a building lease, and if the redemption statutes do not apply to this kind of lease, the Court below was right in so holding and the decree must be affirmed. But we can not agree to the conclusion reached by the Court below upon this question. We find no warrant, either in the language of the statutes, or in the reasons, or necessity, or public policy which prompted their passage to draw a distinction between leases of ground and leases of buildings, or building leases. No

such distinction is found in the statutes, and a construction which would exclude the latter kind of leases would not only exempt from the operation of the statutes a class of leases comprehended within the language of the Acts, but would defeat in large measure the beneficial purposes for which they were passed.

It is provided by Chapter 207 of the Acts of 1900, approved April 5, 1900 (Section 93, Article 21 of the Code), that: "All rents reserved by leases or sub-leases of land hereafter made in this State for a longer period than fifteen years shall be redeemable at any time after the expiration of five years from date of such lease or sub-leases, at the option of the tenant, after notice of one month to the landlord, for a sum of money equal to the capitalization of the rent reserved at a rate not exceeding six per centum."

The generally accepted rule is that a lease of a house or building carries with it the land upon which the building stands, and it can not be denied that the effect of the broad and general language contained in the lease here under consideration was to tie up the land upon which the building stands for the period of twenty years from December 4th, 1915. To hold that this Act was intended to apply only to ground leases would open wide the door to all sorts of arrangements for the evasion of the Act, and "render the law," as was said in *Swan v. Kemp*, 97 Md. 686, "futile for the accomplishment of its object." It would result in permitting the creation of a large class of irredeemable rents, although the land upon which the buildings stood was effectually and indefinitely tied up. We can not adopt, what seems to us, such an unreasonable and disastrous construction of the Act. In *Swan v. Kemp*, *supra*, the Court had under consideration the Act of 1884, Chapter 485, which, upon the question we are now dealing with, was identical with Chapter 207 of the Act of 1900. The appellant contended that that Act was limited to leases of land, but it was held that the prohibition applied as well to leases of already improved land as to a

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lease of vacant land. The facts of that case, briefly stated, were that Mrs. Swan was the owner in fee of a lot of ground on Baltimore street which was improved by a valuable building long used for business purposes. After the passage of the Act of 1884, Chapter 485, she leased those premises to Alonzo Lilly for a period of 99 years renewable forever. In 1897 Lilly executed a deed for the premises to Lawrence B. Kemp and Christian Devries in trust for the purposes stated in the deed. Under the power of sale contained in the deed, the trustees sold the premises to Henry Kirk for \$65,000. The purchase price was for the property in fee simple, and it was agreed between the purchaser and the trustees that \$50,000 of the purchase money—that amount being the capitalization at six per cent. of the rent reserved by the lease—should be applied to the extinguishment of the rent so reserved. The sale was reported to the Court and ratified. The trustees to consummate the sale tendered the reversionary owners of the fee \$50,000, and all arrears of rent, and requested a conveyance of the fee simple interest and reversion. The owners refused to make the conveyance, “and based their refusal upon the claim that the Act of 1884, Chapter 485, did not apply to such a case as this *where a lease was made of property already improved, etc.*” After quoting the provisions of the Act, JUDGE JONES, in delivering the opinion of the Court, said: “A mere reading of the statute is sufficient to show that the lease we are dealing with here is within its letter. No attempt at argument or illustration could make that plainer. Now is it not within the mischief the statute was intended to remedy? within the object it was intended to accomplish? within the policy it was intended to establish?”

“In the case of *Stewart v. Gorter*, 70 Md. 242, the legislation we have now under consideration was before this Court for construction as to its purport, object and effect, and it was there declared that it ‘was the result of a well grounded belief that these long leases, with their covenants of renewal,

were injurious to the prosperity of the City of Baltimore, and that sound public policy demanded that all leases hereafter made, if for more than fifteen years, might be ended at the option of the tenant or lessee upon paying the capitalization of his ground rent at six per centum. It was the system of these long leases, irredeemable until the end of the term, that the Legislature wished to break up.' This legislation was thus, in effect, pronounced remedial in its character. It is, therefore, by the settled rule of construction in such cases to be liberally construed so as to advance the remedy and suppress or prevent the mischief against which it is directed. Accordingly, it was applied in the case just cited to a lease which, by its strict, literal terms, did not come within the wording of the statute. It was there also held that the policy of the law could not be contravened by a waiver of its provisions by the parties to the lease. This latter ruling was made in respect to an express provision inserted in that lease that was the subject of adjudication in the case referred to, to the effect that the lessee 'would not avail himself of any right that he might have by virtue of any Maryland statute to redeem the rent at a less sum than that fixed in the lease.'

"The effect of the ruling of the Court in the case of *Stewart v. Gorter, supra*, is that the legislation in question should be construed to carry out its policy; and will not be allowed to be thwarted by agreements or contractual provisions evasive of its purpose. If express agreements and provisions are not allowed to avoid the effect of the legislation in question the Courts will not be astute, in cases falling within the letter and terms of the law, to find reasons for wresting them from its operation by construction. In the case at bar the reason urged for holding the lease in controversy not subject to the operation of the statute, which has been set out, is without force. By its terms the statute applies to all leases of land for a longer period than fifteen years. No exception or qualification appears in it as it reads. Its purpose, as this

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Opinion of the Court.

Court has held, is 'to break up' the *system* of irredeemable rents. Why is the lease here in controversy not within the reason and policy of such a law as it is within its letter? What sound reason can there be for making a distinction in legislation against the system of irredeemable leases between leases of land already built upon, and leases of land that is forthwith to be built upon? To put upon a measure intended to be prohibitory of such leases a construction making such a distinction would be to render the law utterly futile for the accomplishment of its object. The opportunity which would thereby be afforded for evading the operation of the law and nullifying its purpose is obvious; and is a controlling reason why such a construction should not be adopted. \* \* \* Further than this it has been held by this Court as 'settled by authority,' that where rights are acquired under a statute, in the nature of a contract, or where there is a grant of power, a repeal of the statute will not divest the right or interest acquired, or annul acts done under it."

Upon this branch of the case, our conclusion is that the lower Court was in error in holding that the redemption statutes do not apply to leases of this kind.

If the plaintiff had a right to redeem the rent prior to the Act of 1914, Chapter 371, relied on in the appellees' answer, that right was not affected by the passage of that Act, because his right of redemption was in the nature of a contract and he could not be deprived of vested rights by subsequent legislation.

Code, Article 53, Section 24, declares that: "All rents reserved by leases or sub-leases of land made in this State after April 5, 1900, for a longer period than fifteen years, shall be redeemable at any time after expiration of five years from *date of such lease or such sub-lease, etc.*" This is a sub-lease; it is for a longer period than fifteen years; it was dated March 16, 1906, and the bill was not filed for more than five years from the date of the sub-lease, and under the plain provisions of the statute it would appear to be now

redeemable. But it is said that the words "from date of such lease or sub-lease," mean from "the commencement of the term." The statute does not so provide, and under such a construction by means of a series of leases and agreements, executed at one time and to take effect at different periods in the future, the law might be successfully frustrated.

To maintain the Act in its full vigor, and to secure its full remedial benefits, we are unwilling to adopt a construction which would inevitably lead to abuses and evasions of its provisions.

With respect to the claim made by the appellees, that the relief prayed for ought not to be granted because the plaintiff has not erected a new building upon the demised premises, or paid in cash \$10,000, as provided in the clause of the lease hereinbefore quoted: There is some apparent injustice in permitting a lessee to redeem before he has performed the agreement on his part embodied in the lease. But the answer to this objection is twofold: *first*, the lessee's right to redeem "for a sum of money equal to the capitalization of the *rent reserved* at a rate not exceeding six per centum" is a statutory right, and in legal contemplation the lease must be read as if this right of redemption were incorporated in it, and the Court must hold that the parties contracted with reference to and with knowledge of this right; *secondly*, this right was given for the benefit of the public and not out of any special consideration for the parties to the lease, and, as was held in *Stewart v. Gorter*, 70 Md. 244, the lessee "can not be estopped by any covenant, however strongly worded, from claiming the right guaranteed him by the Act. It would be a virtual repeal of the Act if covenants and agreements were allowed to supersede its express provisions." It follows that the decree of the lower Court must be reversed.

*Decree reversed and cause remanded, the appellees to pay the costs.*

Md.]

Syllabus

COUNTY COMMISSIONERS OF ALLEGANY  
COUNTY

vs.

STATE LUNACY COMMISSION.

*Insane: care of—; Allegany County. State's liability: statutes; interpretation; Chapter 778 of Acts of 1914.*

In the interpretation of statutes, courts must endeavor to ascertain the intention of the Legislature, and this intention may be gathered not merely from the language of its enactments, but also from the causes which occasioned their passage, and from the surrounding circumstances existing at the time.

p. 162

The amount of the State's liability, under Chapter 778 of the Acts of 1914, for the support of dependent insane at Sylvan Retreat is the *deficiency* between the amount paid by Allegany County and other counties of Maryland, and the actual cost of supporting and maintaining such persons.

p. 165

The State's liability is not limited by the Act only to the deficiency arising from the care of dependent insane sent there by other counties than Allegany County.

p. 165

*Decided December 4th, 1915.*

Appeal from the Superior Court of Baltimore City.  
(DAWKINS, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, UERNER, STOCKBRIDGE and CONSTABLE, JJ.

*Alfred S. Niles* (with whom was *Walter C. Capper* on the brief), for the appellant.

*Edgar Allan Poe*, the Attorney-General, submitted the cause on brief for the appellee.

BURKE, J., delivered the opinion of the Court.

This is an appeal from an order of the Superior Court of Baltimore City passed on the 13th day of August, 1915, dismissing a petition for mandamus filed by the appellant against Arthur P. Herring, the Secretary of the Lunacy Commission of the State of Maryland. The object of the petition was to require the defendant to approve the statement submitted to him and exhibited with the bill. This statement will be presently referred to. The defendant demurred to the petition. At the hearing of the demurrer it was admitted by the defendant, as stated in the record, "that all the facts stated in the petition are true subject to their legal relevancy, and agreement in open Court that the demurrer together with said admission shall be treated as an answer if required." The Court sustained the demurrer, and, treating it as an answer under the agreement, dismissed the petition, and from this action the petitioner has appealed.

Whether the State is liable, under the Act of 1914, Chapter 778, to the petitioner for the sum of \$5,223.18 for the support and maintenance of dependent insane persons of the State of Maryland for the year 1914 treated at Sylvan Retreat in Allegany County as shown in the statement referred to, is the sole question presented by this appeal. The question is a narrow one,—its determination depending upon the proper interpretation of the statute. No constitutional question is involved,—the single question being whether the State by the Act mentioned has imposed this liability upon itself. If it intended to do so, there is no reason why the writ of mandamus should not have issued as prayed. In the construction of the Act the Court must endeavor to ascertain the intention of the Legislature, and this intention may be gathered not merely from the language of the enactment, but also from the causes which prompted its passage and from surrounding circumstances existing at the time, or, as was said in *C. & O. Canal Co. v. B. & O. R. R. Co.*, 4 Gill & Johnson, 152: "Statutes should be construed with a view to the original intent and meaning of the makers, and

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Opinion of the Court.

such construction should be put upon them as best to answer that intention which may be gathered from the cause or necessity of making the Act, or from foreign circumstances, and when discovered ought to be followed, although such construction may seem to be contrary to the letter of the statute."

The Act under consideration will be examined in the light of these principles. It is entitled: "An Act to appropriate certain sums of money to the County Commissioners of Allegany County, Maryland, for the support and maintenance at Sylvan Retreat of dependent insane persons of Maryland, to meet the difference between the amount paid by the counties of Maryland and the actual cost of supporting and maintaining such persons at said Asylum." The first section imposes the duty upon County Commissioners to keep minute and accurate account of all monies received and disbursed for the support and maintenance of dependent insane persons of Maryland in their charge at Sylvan Retreat, and at the end of the years 1914 and 1915 shall prepare a complete statement thereof, "which shall be submitted to the Secretary of the Lunacy Commission, and upon his approval of the same and it shall appear that there is a deficiency between the amount paid by Allegany County and other counties of Maryland and the actual cost of supporting and maintaining such persons, the said deficiency shall be reimbursed by the State." The sum of \$10,000 or so much thereof as might be necessary is appropriated by section 2 of the Act "to the County Commissioners of Allegany County to pay for any and all deficiencies arising from the support and maintenance of dependent insane persons of Maryland, approved and ascertained as provided in the above section for the year 1914, and a like sum of \$10,000 for the year 1915, or so much thereof as may be necessary, and the Comptroller of the Treasury be and he is hereby authorized and directed to issue his warrant upon the Treasurer for such amounts, and payable to the said Commissioners upon the production of the required approval and certification of the correctness of the account."

The account verified, by affidavit, for all monies received and disbursed by the County Commissioners of Allegany County for the support and maintenance of dependent insane persons of Maryland, from January 1st, 1914, to January 1st, 1915, was presented to the defendant, and upon the advice of the Attorney-General and in which he concurred, he refused to approve the account. The account complies with the requirements of the Act and no exception is made of it. It shows that the total cost of supporting and maintaining said patients at Sylvan Retreat for the year 1914 was \$15,185.31 We quote as follows from the account:

“Average daily number of patients at Sylvan Retreat during the year 1914, 84.86; maintained at said institution during said year at a total net cost of \$13,710.05, makes an average cost of each patient for said year the sum of.....	161.56
“Amount paid by Allegany County and other Counties of Maryland to the State for support and maintenance of insane patients. . . . .	100.00
“Deficiency per patient suffered by Allegany County . . . . .	61.56
“Deficiency based on a daily average attendance at said institution during said year of 84.86 patients, at the sum of \$61.56 each, amounts to a total deficiency suffered by Allegany County, and for which it claims reimbursements under Chapter 778 of the Acts of 1914, of....	5,223.98.”

It thus appears that the claim made is for a deficiency of sixty-one dollars and fifty-six cents per patient for the actual cost of supporting and maintaining dependent insane persons of Maryland at Sylvan Retreat,—that the other counties of the State paid \$100 per patient for the support and maintenance of insane patients in State hospitals was taken as an essential fact in the ascertainment of this deficiency.

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Opinion of the Court.

Under the Act of 1910, Chapter 715, p. 185, the amount required to be paid by the counties for the support of such an insane person in State Institutions was \$100, and the remaining amount required for the board, care and treatment of such an insane person was payable by the State. It could not be and is not claimed that under the system adopted by the State for the care of its dependent insane by that, and prior acts, this claim could be maintained. But it appears to us that it was the evident intention of the Act of 1914, Chapter 778, to recognize Sylvan Retreat,—a private insane asylum owned and controlled by Allegany County,—as a proper place in which dependent insane persons of Maryland might be confined, for care and treatment, and that a portion of the cost of their support and maintenance should be paid by the State, and for that purpose an appropriation for the years 1914 and 1915. The amount of the State's liability was, as declared by the Act, to be "the *deficiency* between the amount paid by Allegany County and other counties of Maryland and the *actual cost* of supporting and maintaining such persons." This deficiency, by reference to the provisions of the public law and by the account directed by the Act to be submitted to the Secretary of the Lunacy Commission of the State, is readily ascertainable.

This construction gives effect to the intention of the Legislature and it does no injustice to the State, which pays much more *per capita* than is charged in this account. It would be a narrow and unreasonable construction to hold that the only dependent insane for which Allegany County should be paid anything under the Act were those sent from other counties of the State to Sylvan Retreat. It follows from this conclusion that the order from which this appeal was taken must be reversed.

*Order reversed, with costs, and cause remanded.*

## STATE OF MARYLAND

vs.

ROBERT E. GEDDES.

*Insurance brokers: who are; licenses; section 218 of Article 23 of the Code. Laws: extension of—; a legislative function.*

Section 218 of Article 23, defining who are to be deemed insurance brokers, within the meaning of the law, while not including all who may assist in making out and delivering policies, or in collecting the premiums, or giving out notices, etc., includes in that term all who, for a compensation, aid in negotiating contracts of insurance. p. 168

A clerk, hired by a firm of licensed insurance brokers, who, under their orders, delivered a policy previously effected by the firm, and collected the premium therefor, is not acting in violation of the Act. p. 168

For such a person to go, at the behest of his employers, to the agents of other insurance companies, to effect the placing a risk, is a distinctly *clerical service*, rendered to his own employers, and not to the person seeking the insurance, and such acts are not "aiding in negotiating insurance," within the meaning of the law. pp. 169-170

But a person who, without a license, acts as the procurer or procuring cause in obtaining business for an insurance broker, and aids in negotiating insurance contracts, comes under the inhibition of the law. p. 169

And the soliciting and obtaining of the renewal of a policy already in force does not differ from the act of soliciting and procuring the original agreement, and a party who acts for compensation in procuring such a renewal, is an insurance broker. p. 170

It is for the Legislature, and not for the courts, to extend the laws, when it may deem advisable, so as to cover cases not provided for in existing statutes. p. 170

*Decided December 7th, 1915.*

Appeal from the Criminal Court of Baltimore City.  
(BOND, J.)

Md.]

## Opinion of the Court.

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BEEKE, THOMAS, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Lindsay C. Spencer, Assistant State's Attorney, and Edgar Allan Poe, the Attorney-General, (with whom was Wm. F. Broening, State's Attorney for Baltimore City, upon the brief), for the appellant.*

*Charles Claggett and William L. Marbury (with whom was James Thomas upon the brief), for the appellee.*

STOCKBRIDGE, J., delivered the opinion of the Court.

The traverser, Robert E. Geddes, was indicted by the Grand Jury of Baltimore City, on the charge of violating the provisions of the Code of Public General Laws in regard to insurance brokers, in that he had acted as such a broker without having procured the license required under sections 218 and 219 of Article 23 of the Code. The indictment contained six counts, each charging the offense in varying language, by which it was sought to set out the different acts done or supposed to have been done by the traverser, any one of which would amount to a violation of the statute. The indictment and each count of it was demurred to. The Criminal Court of Baltimore City overruled the demurrer as to the first count, but sustained it as to the remaining five counts. The case proceeded to trial on the first count and Mr. Geddes was acquitted. The State then appealed, thus bringing up for review the correctness of the ruling of the trial Court with regard to the five counts, the demurrer to which was sustained.

The first count is not before us for consideration, and if it were the traverser concedes that the count was good and properly charged an offense under the statute. The fifth count may be equally readily disposed of. Section 218 of the Article embodies the following definition of who is to be regarded as an insurance broker: "Whoever, for compensation, acts or aids in any manner in negotiating contracts of insur-

ance, or re-insurance, or placing risks or affecting insurance or re-insurance for a person other than himself, and not being a duly appointed solicitor agent or officer of the company in which such insurance or re-insurance is effected, shall be deemed an insurance broker within the meaning of this article."

The important element is the "negotiating contracts" of insurance. There may be and doubtless are many acts done in and about the making out, and delivering of policies, collecting premiums thereon, or giving notices in connection therewith of a purely clerical description, but so long as they do not relate to the negotiation of the contract, they do not come within the terms of the act.

In the fifth count it was charged that Geddes was a clerk for hire of the firm of Turner & Thomas, who were licensed insurance brokers, and that while so employed and acting in pursuance of the instructions of said firm did deliver to James S. Francis a policy of insurance previously effected by said firm and collect the premium due on the policy, which premium Geddes handed over to said firm. Conceding that the traverser had done every act set forth in this count, none of them amounted to the negotiation of a contract, or even aiding therein, and the demurrer to this count was therefore properly sustained.

The second count sets out that Geddes was employed by Turner & Thomas as a solicitor of insurance to be placed through that firm of brokers, and inducing persons who might be desirous of placing insurance to do so through such firm, and that for such services Geddes was paid a commission on the business he brought in to the firm of Turner & Thomas. Stated in simpler terms the charge here was that the traverser was the procurer, or procuring cause as it is some times expressed of business for his employers. If now he was the means through which the business was obtained, he was certainly an aid in the negotiation of the contracts, even though the insurance policies were issued by a company or companies for which Turner & Thomas were not the agents. The

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Opinion of the Court.

statute does not make it necessary that a person to be a broker shall be the sole intermediary between the insured and the company issuing the policy; one who "aids" in the negotiation falls within its terms, and therefore he who brings the person desiring insurance and the company together, even through the intervention of a third party is an "aid," and falls within the terms of the statute.

It was suggested by the Attorney-General in argument that the traverser might be liable under sections 184 and 192 of Article 23. But so far as the present case is concerned it is sufficient to say that Mr. Geddes was not indicted under these sections, which relate solely to solicitors for insurance companies, that nowhere is there any provision for solicitors for insurance brokers, and that one who acts as a solicitor for such broker is either subject to no license whatever, or else he is within the definition of a broker. The Court below was therefore in error in sustaining the demurrer to the second count.

The third count differs from the second in two respects, viz: Setting forth that the employment of Mr. Geddes was as a clerk, instead of solicitor, and that he was paid a salary, instead of a commission on business secured. The count further sets out that his clerical duties included the soliciting and procuring customers for said firm, and that he did solicit and procure from James S. Francis, authority for the firm of Turner & Thomas to place certain insurance for said Francis. With such allegations this count in the indictment must be regarded as sufficient in accordance with what has been said in respect to the second count.

The fourth count sets out the employment of Geddes as a clerk upon a salary, and that Francis having authorized Turner & Thomas to place certain insurance for him, Geddes, in the course and as a part of his employment, was sent by his employers to the agents of one or more insurance companies to effect the placing of the risk. This was a distinctly clerical service rendered not to the one seeking the insurance but to the employers of the traverser. To construe such an

act as a violation of the statute would be to render it ridiculous, which a Court will never do. 36 *Cyc.* 1107; *Fields v. U. S.*, 27 App. Cas. (D. C.) 433. We accordingly concur with the lower Court in sustaining the demurrer to this count.

By the sixth count the offense charged consisted in soliciting and obtained the renewal of a policy already in force. There is nothing in the record to show that the policy so renewed differed in any material respect from the usual policy of insurance. Assuming it to have been such, the original contract was one of indemnity for a specified length of time, one which would terminate by the mere lapse of time, upon the completion of the period for which it was entered into. The parties might agree to continue the contractual relation for a still longer time, under the name of a renewal, but in legal effect it amounted to a new contract, supported by a new consideration, and requiring the assent of both parties just as much as the original contract. The act of soliciting and procuring the new contract, or renewal as it is called can not be distinguished from the act of soliciting and procuring the original agreement, and must be governed by the same considerations as applied when discussing the second and third counts, and the demurrer to this count should have been overruled.

It may very well be that in a proper adjustment and regulation of the business of insurance, in view of the exigencies of modern business, and with a due regard to the revenues of the State, some provision should be made for the licensing of solicitors for insurance brokers, but the power to do so is a legislative one, and as yet the Legislature has not acted upon the subject, but the remedy for that must be sought elsewhere than in the courts.

For the errors indicated in the rulings of the Criminal Court on the 2nd, 3rd and 6th counts, the judgment must be reversed and the case remanded in order that the traverser may be tried upon these counts.

*Judgment reversed, with costs.*

Md.]

Syllabus.

MARY DE BREE HIGGINS ET AL.

vs.

SAFE DEPOSIT AND TRUST COMPANY OF BALTI-  
MORE, EXECUTOR.

*Wills: construction; technical rules and intention; general and particular intent; testator's right to divide his estate as he pleases; equality among relatives.*

In construing wills, if the court is satisfied that the technical rules, which have been applied to particular expressions, will not carry out, but defeat, the intention of the testator, the rules must yield to such intention, and such construction given as will effectuate that intent. p. 175

In the construction of wills, if there be apparent a general and a particular intent, the general intent, although first expressed, controls and overrules the particular intent, if there is any conflict between them. p. 175

A clearly expressed intention in one portion of a will is not to yield to a doubtful construction in any other portion. p. 175

A testator may make division of his estate among his legatees equally or unequally, as he may see fit. p. 177

As between individuals in the same degree of relationship, equality would mean equality of sharing, or of participation. p. 177

The mere fact that a testator, in dividing the remainder of his estate among certain legatees, adds an "s" to the last name of each, is not an indication that the division was to be made by families.

p. 177

*Decided December 4th, 1915.*

Appeal from Circuit Court No. 2 of Baltimore City.  
(HEUISLER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, PATTISON, UENER, STOCKBRIDGE and CONSTABLE, JJ.

*S. S. Field*, for the appellants.

*R. E. Lee Marshall*, for the appellees.

A brief was filed by *Stuart S. Janney*, solicitor for the Walton defendants, and by *R. E. Lee Marshall*, solicitor for Sosthene Baillio.

A brief was also filed by *George A. Frick* and *E. A. Bilisoly* and *H. Dinwiddie Martin*, on behalf of Ignatius H. Baillio, Cary Andrews Baillio and Oliveira Andrews Baillio, etc.

STOCKBRIDGE, J., delivered the opinion of the Court.

In the construction of any will but little help is to be obtained from adjudicated cases. There are certain general principles and rules of construction which the cases lay down, and these are in entire harmony in all jurisdictions. But the difficulty arises in the application of those principles to

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## Opinion of the Court.

any given will, by reason of slight variations of phraseology in a particular case, or in the nature of the relationship of the testator to his legatees or devisees. The clause which this Court is called upon to construe in the present case is found in the will of Oliveira Andrews, and reads as follows:

"I bequeath to Mrs. Emilie Major, two hundred dollars, and five hundred dollars a year during her life for which I intrust to my sister five thousand dollars in securities, the interest of which will in part pay the annuity, and she may make up the deficiency out of the principal which in this way should last her life, and at her death the remainder may be divided equally among the legatees in Norfolk, Baillios, Waltons, Brookes and Higgins."

It is alleged in the bill, admitted in the answer, and sustained by the proof, that there were living in Norfolk and named in Mr. Andrews' will, seven second cousins, one by the name of Baillio, one by the name of Walton, one by the name of Brooke and four by the name of Higgins. The life estate created by the clause quoted had terminated during the lifetime of the testator, and his sister is also dead. The question now is as to the distribution of the \$5,000 among the remaindermen.

The appellees claim that under the language of the first clause, the distribution of this fund should be made by families, and that such a division would result in a division of the \$5,000 into four parts, of which the four persons bearing the name of Higgins would be entitled to but a single part.

The clause relied upon to sustain that contention is as follows:

"I appoint the Safe Deposit and Trust Company of South street, Baltimore, as my executors; I give, grant and devise to my sister, Eliza Andrews, my interest in the realty in Norfolk, Virginia, owned by us in common, intrusting her to distribute the rents coming from that property between the families of our cousins, Mrs. Sallie Baillio, Mrs. Mary Walton and Mrs.

Tucker Brooke, deducting two hundred and fifty dollars to be paid during her life to Mrs. Emilie Major, our cousin, during her life, and at her death to be paid to the legatees before mentioned. The rents coming from the house on the north side of Main street to Mrs. Baillio, the rent of the lot on Water street, to Mrs. Mary Walton, and that from the house on the south side of Main street, to Mrs. Tucker Brooke. She may use her discretion in dividing this money, however, between these families to her judgment of their respective needs, and may if she thinks proper give a portion of twenty per cent of it to Miss Mary Debreë Higgins, and to her sister, Miss Margaret Higgins. She may dispose by will of this property between these families as she may think best."

The Circuit Court No. 2 of Baltimore City adopted the view of the appellees and entered a decree accordingly. The terms of the decree were erroneous, if for no other reason, because in a practically unbroken line of decisions it is held that the use of the word "family" means parents and children, whether living together or not (*Cosgrove v. Cosgrove*, 69 Conn. 416), and therefore if the contention of the appellees is correct, and a distribution is to be made by families, the children of Mrs. Walton and Mrs. Brooke should share *per capita* in the distribution, as well as the mothers.

On the other hand, the position of the appellants is that the first clause above quoted contemplated a division between individuals and not families, and that, therefore, the \$5,000 should be divided into sevenths, one-seventh to pass to the proper representatives of Mrs. Baillio, who has died since the death of the testator, one to Mrs. Walton, one to Mrs. Brooke and one to each of the following, Mary de Bree Higgins, Margaret Taylor Higgins, Edward Higgins and John de Bree Higgins.

The rules for the construction of wills are laid down in both the text writers and the adjudicated cases. So far as is necessary to consider them in this case, the law is well ex-

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## Opinion of the Court.

pressed in the case of *Feltman v. Butts, &c.*, 71 Ky. 115, where it is said: "In cases in which technical rules have been applied to particular expressions, if we are satisfied after an examination of the instrument that those technical rules will not carry out but defeat the intention of the author, the technical rules must yield to the intention and such a construction must be given as will effectuate it."

And where there are possible conflicts growing out of the phraseology of a will, the rule was laid down in *Hemsley v. Hollingsworth*, 119 Md. 431, by JUDGE BOYD, following the cases of *Taylor v. Watson*, 35 Md. 519 and *Pue v. Pue*, 1 Md. Ch. 382, in these words: "The general rule in the construction of wills is that where there is a general and particular intent apparent upon the face, the general intent although first expressed shall control and overrule the particular, if there is a conflict between them." And this is in entire consonance with the decisions in *Abell v. Abell*, 75 Md. 57; *Robinson v. Bonaparte*, 102 Md. 71; and *Gordon v. Smith*, 103 Md. 315.

In *Corrigan v. Kiernan*, 1 Bradf. Sur. Rpts. (N. Y.) 208, it is stated in these terms: "It is a sound principle of construction that a clearly manifested intention in any part of a will ought not to give place to a doubtful provision or ambiguous meaning. An express and positive devise cannot be controlled by subsequent words of uncertain import; the latter prevailing only when they are absolutely irreconcilable with the former."

This doctrine is adopted by Mr. Redfield in his work on "Wills," Vol. 1, 3rd Ed., p. 434, where he gives as the fourth of the general rules applicable to the construction of wills: "A clearly expressed intention in one portion of a will is not to yield to a doubtful construction in any other portion of the instrument."

With these rules in mind, how is the will of Mr. Andrews in the present case to be construed?

In the first clause of his will he devises the rents to be derived from three houses in Norfolk to be distributed "be-

tween the families of our cousins Mrs. Sallie Baillio, Mrs. Mary Walton and Mrs. Tucker Brooke" after certain deductions have been made therefrom. Notwithstanding this phraseology it was apparently his intention that the net rents so given should be paid, not to the families of these three ladies, but to the ladies themselves, and this is then further limited by vesting in his sister a discretionary power to give 20% of the rents to Mary de Bree Higgins and Margaret Higgins. It is from this clause that it is sought by the appellee to derive a general intent of the testator of a division of his property among "families." The difficulties with this contention are two-fold: first, the clause while not strictly speaking a specific legacy of the three pieces of property or the income derived from them, approximates it so closely as to make it scarcely distinguishable from a specific legacy, and no general intent of a testator is to be derived from the provision of a clause of his will which amounts to a specific legacy; secondly, the clause is to a large extent self contradictory, in that, after having given certain rents to the "families" of Mrs. Baillio, Mrs. Walton and Mrs. Brooke, which as has been shown would in each case include their children, provides that the rents coming from particular property were to go, not to the families, but to the ladies named, and then follows a still further limitation, giving to the testator's sister a discretionary power to devote one-fifth for the benefit of other persons, namely, the Misses Higgins. For these reasons this clause must be regarded as ambiguous to such a degree that no general intent whatever on the part of the testator can be deduced from it.

Passing now to the clause of the will first hereinbefore recited, the question is presented which is suggested by the language quoted: "The remainder may be divided *equally* among the legatees in Norfolk, Baillios, Waltons, Brookes and Higgins," and an argument is sought to be based that the family idea for which the appellees contend, is to be derived from the pluralizing of the names "Baillios, Waltons, Brookes and Higgins." The will in question while in most respects

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## Opinion of the Court.

well drawn is not at all points marked by technical preciseness, and suggests that it may have been written by the testator. The inconsistencies pointed out in the first clause of the will illustrate this. Moreover, this bequest was primarily to "the legatees in Norfolk," it would have been complete without the addition of the names; but the children of Mrs. Baillio, Mrs. Walton and Mrs. Brooke are nowhere mentioned in the will, except in so far as they are to be included, if at all, in the first paragraph. On the other hand, all four of the testator's second cousins bearing the name of Higgins are legatees by name, and to say that it was the intent of the testator by the addition of the letter "s" to the names Baillio, Walton and Brooke to make a division by families, would be a strained and artificial distinction, not in consonance with what is apparently the purpose of this clause, and therefore, not to be sanctioned under the rule laid down in *Abell v. Abell*, *supra*.

It is of course entirely competent for a testator to make division of his estate among his legatees equally or unequally as he may see fit. What constitutes equality may not be so easy of definition, but as between individuals standing in the same degree of relationship, it would seem that equality would mean equality of sharing or participation. That would be accomplished in the present case by the division of the \$5,000 into sevenths, of which one-seventh each would be the share of those representing Mrs. Baillio, of Mrs. Walton, of Mrs. Brooke, and each of the four named Higgins, and would gratify the expressed intent of the testator that the \$5,000 should be divided equally.

In the brief filed on behalf of Ignatius H., Cary A. and Oliveira Baillio suggestion is made that Laurence Brooke is one of those who come within the designation contained in the clause under consideration. The difficulty with this is, that no such claim is set up in the answer of Laurence Brooke or in the brief of the counsel who apparently represented him. He is not mentioned in the will as residing in Norfolk, as are the other persons, and apparently does not

come within the description of legatees under the clause which has been considered.

By agreement of the parties it was stipulated that the cost of this proceeding, together with certain counsel fees, should be paid out of the \$5,000, and the decree of the Circuit Court was in accordance therewith, but for the reasons already indicated the decree of the Circuit Court No. 2 of Baltimore City must be reversed, and the case remanded, with direction to said Court to so amend the third paragraph of the said decree, which provides for the division of the fund in question, that the same shall be divided into seven equal parts, of which seven parts, one shall be distributable and payable to Mary C. Walton, one to Lucy B. Brooke, one to Mary de Bree Higgins, one to Margaret Taylor Higgins, one to Edward Higgins, one to John de Bree Higgins, and that the remaining seventh part shall be then distributed, one-third thereof to Sosthene Baillio, surviving husband of Sallie Baillio, and one-sixth of said one-seventh equal portion, to each of the following: Ignatius Higgins Baillio, Cary Andrews Baillio, Gervais Baillio and Oliveira Andrews Baillio.

*Decree reversed and cause remanded, costs to be paid out of the fund.*

Md.]

Syllabus.

THE NATIONAL LIFE INSURANCE COMPANY OF  
THE UNITED STATES

*vs.*

JOHN C. FLEMING ET AL.

*Contributory negligence—: when a question for the jury. Accident insurance: construction; general clauses and exceptions; risks clearly excluded; “total disability”; passengers “within” a railroad car. Appeals: reversal; granting leave to apply for a new trial.*

When the nature of the act relied on to show contributory negligence can be determined only by a consideration of all the circumstances attending the transaction, it is within the province of the jury to characterize, and it should be left to their determination. p. 183

Where an accident insurance policy covers the risk assumed in a general clause, with an exception in a separate clause, the pleader, relying on the general clause, need not negative the exception; but otherwise where the excepted risk is included in the general clause. p. 184

Where an accident insurance policy insures the holder “while riding as a passenger in a place regularly provided for the transportation of passengers *within* a surface, underground or elevated railroad car,” it does not cover the case of an insured who, while standing on the platform, stepped and fell from the car while it was in motion. p. 186

A policy of accident insurance should not be extended to include risks clearly excluded from the terms of the contract. p. 186

The provision, in an insurance policy, for payment in case of “injuries resulting in total disability,” was: *Held*, owing to the conditions of the policy, to cover a case where the injuries resulted in death. pp. 188-189

Under section 22 of Article 5 of the Code, providing for the ordering of a new trial, when a case is reversed or affirmed on appeal, the court may reverse without ordering a new trial, but granting leave to the appellees to make application for a new

trial, if they so desire, as to the granting of which application the court may then determine. p. 188

*Decided December 2nd, 1915.*

Appeal from the Superior Court of Baltimore City.  
(SOPER, C. J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Charles W. Main*, for the appellant.

*Daniel R. Randall*, for *Brown, Marshall, Brune & Thomas*, attorneys for the appellees.

THOMAS, J., delivered the opinion of the Court.

This suit was brought by the beneficiaries to recover on an accident insurance policy. The policy was issued by the National Insurance Company of the United States to Anna F. Hunt, on the 28th of May, 1912, and the company, subject to the conditions and limitations therein, thereby promised to pay as follows:

"Section A.	Total Losses.
"For loss of life.....	\$2,500.00 &c.
"For loss of both eyes.....	\$2,500.00 &c.
"For loss of both hands.....	\$2,500.00 &c.
"For loss of both feet.....	\$2,500.00 &c.
"For loss of one hand and one foot.....	\$2,500.00 &c.
"For loss of one hand.....	\$ 625.00 &c.
"For loss of one foot.....	\$ 625.00 &c.
"For loss of one eye.....	\$ 250.00 &c.

"Provided such loss shall result within 30 days from date of accident, from accidental bodily injuries, solely and independently of all other causes, and only if such injuries are received as follows:

"1st. While actually riding as a passenger in a place regularly provided for the transportation of passengers, within a surface, underground or elevated railroad car, steamboat, public automobile, omnibus, cab or other public conveyance provided by a common carrier for passenger service only; &c."

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## Opinion of the Court.

Under the title "General Agreements" the policy provided that the insurance did not cover fatal or non-fatal injuries resulting from verdigo, "exposure to unnecessary danger," etc., and that the benefits under "Clause 1st of section A shall not apply to any fatal injuries \* \* \* received while entering or leaving, or which may result from attempting to enter or leave any of the conveyances therein specified."

The declaration contained the common counts in assumpsit, and also a special count, in which, after setting out the issuing of the policy, etc., it was alleged that on the 7th of August, 1912, "while the said Anna F. Hunt was riding as a passenger upon a surface car at Los Angeles, California, and using all proper precaution against accident or injury she was thrown or fell from the car platform of such car to the street and then and there received such injuries as resulted in her death on the said 7th of August, 1912," etc.

The case was tried before the Court without a jury, and at the conclusion of the testimony the defendant offered five prayers. The first three prayers sought to withdraw the case from the Court, sitting as a jury, upon the following grounds: 1. Because the evidence shows "that the injuries which caused the death of the assured were not received while actually riding as a passenger in a place regularly provided for the transportation of passengers within a surface, underground or elevated railroad car provided by a common carrier for passenger service only." 2. Because the evidence shows that the injuries which caused the death of the assured resulted from her exposing herself to unnecessary danger. 3. Because the evidence shows "that the injuries were received while the insured was leaving or resulted from attempting to leave the car." The fourth prayer contained the instruction that if the Court, sitting as a jury, should find from all the evidence that the injuries which caused the death of the assured, "resulted from her exposing herself to unnecessary danger," the verdict should be for the defendant, and the 5th prayer presented the proposition that if the Court should find from all the evidence that the injuries

which caused the death of the assured "were received while leaving, or resulted from attempting to leave the car," then the verdict should be for the defendant. The Court below rejected the first three prayers and granted the fourth and fifth. The defendant excepted to the rejection of its first, second and third prayers, and has brought this appeal from the judgment in favor of the plaintiff for twenty-five hundred dollars.

The evidence, which was taken in Los Angeles, California, under a commission issued out of the Superior Court of Baltimore City, shows that the accident which resulted in the death of the assured occurred about 9:30 o'clock in the evening, in August, 1912, while she was riding as a passenger on one of the street cars of Los Angeles. The front and rear ends of the car on which she was riding were open, and there was a closed compartment in the center. There were six seats on the rear end of the car—three on each side—with an aisle running through the center to the rear platform of the car. The platform was about seven feet wide, and the distance between the back seats and the rear end of the car was about three feet. The two steps from the platform were of the same width as the platform, and there was a hand rail on the rear end of the car.

At the time of the accident the rear end, aisle and platform of the car were crowded with passengers. The assured was apparently not familiar with the streets or route of the car. The conductor in charge of the car testified that when she entered the car she asked him if it went to Tenth and Flower streets, and that when he replied: "No, it goes to Tenth and Figueroa, one block, or Eighth and Flower, two blocks," she said, "All right." According to the testimony produced by the plaintiffs the assured was occupying one of the seats on the rear end of the car, and when the car had passed Flower street and was approaching Figueroa street, she said to one of the witnesses: "Eighth and Figueroa?", and when the witness replied "Yes," she got up and went down the aisle to the platform, and when she reached the

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## Opinion of the Court.

platform she grabbed for the hand rail and missed it and fell or was thrown from the car. The car was stopped, and the assured was found lying on the railroad track in an unconscious condition and died a few hours later. Some of the evidence produced by the defendant tends to show that the assured deliberately stepped from the platform of the car while the car was running at the rate of six or seven miles per hour.

In reference to the second and third prayers it is only necessary to say that the burden was on the defendant to establish the defenses relied upon, and that the question whether the assured was guilty of negligence or of exposing herself to unnecessary danger, and whether she was injured while leaving or attempting to leave the car were, under the circumstances of this case, questions of fact to be determined by the Court, sitting as a jury. 1 *Cyc.* 290; 1 *Corpus Juris*. 497; *Anthony v. Merchantile Mut. Acc. Ass'n.*, 162 Mass. 354, 38 N. E. 973; *Freeman v. Traveler's Ins. Co.*, 144 Mass. 572; *Preferred Acc. Ins. Co. v. Muir*, 126 Fed. Rep. 926; *United Railways v. Riley*, 109 Md. 327; *Alton R. Gas and Electric Co. v. Webb*, 219 Ill. 563.

The car was approaching Figueroa street, and the rear end and platform of the car were crowded with passengers, and the assured may have gone upon the platform with the view of being prepared to get off the car as soon as it stopped at Figueroa street. We said in the case of *United Railways v. Riley*, *supra*, that "when the nature of the act relied on to show contributory negligence can only be determined by all the circumstances attending a transaction, it is within the province of the jury to characterize it," and in that case the Court refused to hold that the plaintiff was guilty of contributory negligence, as a matter of law, in being on the platform of the car at the time of the accident.

The plaintiffs' evidence was to the effect that the assured fell or was thrown from the platform while the defendant offered evidence tending to show that she stepped from the car while it was in motion. In the case of *Anthony v. Mer-*

*chantile Mut. Acc. Ass'n., supra*, the Supreme Judicial Court of Massachusetts said: "The burden being on the defendant to prove that it was from one of the excepted causes, the question remains whether the jury should have been instructed as a matter of law that the burden had been sustained. It is not often, where a party has the burden of proving a fact by the testimony of witnesses, that the jury can be required by the Court to say that the fact is proved. They may disbelieve the witnesses. If the conclusion is to be reached by drawing inferences of fact from other facts agreed, ordinarily the jury alone can draw these inferences." The same rule is stated and applied in the cases of *Calvert Bank v. Katz*, 102 Md. 56, and *Lemp Brewing Co. v. Mantz*, 120 Md. 176.

The defendant's first prayer presents a different proposition. The policy in question is in effect an undertaking on the part of the defendant to pay the sums mentioned for the losses referred to in section A if the injuries are received by the assured while actually riding as a passenger in a place regularly provided for the transportation of passengers within a surface, underground or elevated railroad car, \* \* \* or other public conveyance provided by a common carrier for passenger service only, and to entitle the plaintiff to recover the twenty-five hundred dollars for loss of life, mentioned in section A, they were required to show that the injuries were received under the circumstances stated in Clause 1. In the case of *Freeman v. Travelers Ins. Co.*, 144 Mass. 572, the Court, referring to a policy of insurance, said: "If such an instrument contains in it, first, a general clause, and afterwards a separate and distinct clause which has the effect of taking out of the general clause something that would otherwise be included in it, a party relying upon the general clause, in pleading, may set out that clause only without noticing the separate and distinct clause which operates as an exception; but, if the exception itself is incorporated in the general clause, then the party relying on it must, in pleading state it, together with the exception. It is a general rule

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## Opinion of the Court.

of the law of evidence that it is necessary for a party to prove the substantive facts which he is required affirmatively to aver in his pleading."

The evidence adduced by the plaintiffs shows that the assured at the time she fell or was thrown from the car was not "in a place regularly provided for the transportation of passengers, within," the car, but was on the platform of the car. In the case of *Aetna Life Insurance Co. v. Vandecar*, 30 C. C. A. 48, 86 Fed. 282, it was held that a person riding on the platform of a car was not riding in a conveyance, and the Court said: "The words 'in a passenger conveyance' were doubtless used advisedly and for the express purpose of limiting defendant's liability. The reason for so doing is apparent. The place specified in the contract 'in a passenger conveyance' is a place of little or no danger and the risk assumed is slight, while on the platform of a conveyance using the motive power described in the contract of insurance, and especially, as in this case, on the platform of a railway car is an exceedingly dangerous place when the train to which the car is attached is in motion. We think that the words used in the contract clearly indicate the intention of the parties." In the case of *Mitchell v. German Commercial Acc. Ins. Co.*, 179 Mo. App. 1, the assured was injured while attempting to get on a street car, and the Court held that he was not injured while riding within the car, and said: "The language of the policy is entirely clear to the effect that insurance for accidental death is vouchsafed only in those cases where injuries received which result in death occur while riding as a passenger in a place regularly provided for the transportation of passengers by a common carrier. \* \* \*

The Courts are not authorized to seize upon certain and definite covenants expressed in plain English with violent hands and distort them so as to include a risk clearly excluded by the insurance contract." In the case of *Van Bokkelen v. Traveler's Ins. Co.*, 34 N. Y. Appellate Div. 399, 54 N. Y. Supp. 307, which was affirmed in 167 N. Y. 590, 60 N. E. 1121, the assured was thrown or fell from the

platform of a car, and the Court held that he was not injured "while riding as a passenger in a passenger conveyance," and in the case of *Preferred Acc. Ins. Co. v. Muir*, 126 Fed. Rep. 926, the Court distinguished that case, where the language of the policy was, "riding as a passenger in or on a passenger conveyance," from a case where the provision of the policy was, "If such injuries are sustained while riding as a passenger in a passenger conveyance." In the case of *Anable v. Fidelity & Casualty Co. of New York*, 73 N. J. L. 320, 63 Atl. Rep. 92; 74 N. J. L. 686, 65 Atl. Rep. 1117, the language of the policy was somewhat different from the terms of the policy here in question, but the reasoning of the Court is in accord with the cases from which we have quoted. The case of *King v. Traveler's Ins. Co.*, 101 Ga. 64, placed a different construction upon the words, "in any passenger conveyance," and held that the plaintiff, who was injured while attempting to alight from a moving street car was entitled to recover. But that case relied upon the statement in 2 *May on Ins.*, sec. 524, where it is said: "A person may be said to be traveling in a carriage while alighting therefrom, until he has completely disconnected himself and alighted," and the case of *Northrop v. Ry. Passenger Assurance Co.*, 43 N. Y. 516. In the case at bar the policy exempts the company from liability for injuries received while the assured is entering or leaving a car, and in the case of *Northrop v. Ry. Passenger Assurance Co.*, *supra*, the terms of the policy were unlike the provisions of the policy in this case and the case of *Van Bokkelen v. Traveler's Ins. Co.*, *supra*. The language of the policy with which we are now concerned, while "riding as a passenger in a place regularly provided for the transportation of passengers, within a surface, underground or elevated railroad car," is too clear and free from ambiguity to admit of any doubt as to the intention of the parties, and should not therefore be construed to include risks clearly excluded by the terms of the contract.

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The defendant's first prayer refers to the pleadings in the case, and in their declaration the plaintiffs seek to recover only on the promise in the policy, in section A, to pay twenty-five hundred dollars for loss of life. Therefore as the contract of the defendants, in section A, was to pay the twenty-five hundred dollars for loss of life if the assured was injured while riding as a passenger *within* a surface, underground or elevated railroad car, and as the evidence shows that the assured at time she received the injuries which resulted in her death was not riding *within* the car from which she fell or was thrown, the defendant's first prayer should have been granted.

There are only two other exceptions, and they relate to the rulings of the Court on the evidence. The evidence admitted in the first exception, and the evidence the Court refused to strike out in the second exception could not have injured the defendant, and even if it was inadmissible, its admission would not constitute reversible error.

In section C of the policy the following provision was made for "Special Indemnity": "Should the assured sustain any bodily injury, effected exclusively by external, violent or accidental means, not happening as specified in section A hereof, which shall, independently of all other causes, immediately, continuously and wholly disable the assured and be the sole cause of one of the total losses mentioned in section A, within thirty days of the date of the event causing such injury, the company will pay one-twenty-fifth of the amounts specified in section A for such loss."

As the assured sustained a bodily injury, which did not happen as specified in section A, and which, independently of all other causes, immediately, continuously and wholly disabled the assured, and was the sole cause of her death, one of the total losses mentioned in section A, the plaintiffs would, under proper pleadings, be entitled to recover under section C one-twenty-fifth of the twenty-five hundred dollars mentioned in section A for loss of life.

There are cases holding that the words "wholly disable" and the words "total disability" do not include death, but these cases all rest upon the particular provisions of the policy under consideration. *Hall v. American Liability Insurance Co.*, 96 Ga. 413; *Dawson v. Accident Ins. Co. of North America*, 38 Mo. App. 355. Here the policy refers to injuries wholly disabling the assured and causing one of the losses mentioned in section A, and one of the losses mentioned in section A is the loss of life. Moreover section C is obviously intended to cover the losses mentioned in section A resulting from injuries not received under the circumstances stated in Clause 1 of section A, and which would not otherwise be covered by the policy.

Section 22 of Article 5 of the Code provides: "In all cases where judgment shall be reversed or affirmed by the Court of Appeals, and it shall appear to the Court that a new trial ought to be had, such new trial shall be awarded," etc. In this case we will reverse the judgment without awarding a new trial, but we will grant the appellees leave to make application for a new trial, if they so desire, and then determine whether it shall be awarded. *Milske v. Steiner Mantel Co.*, 103 Md. 235; *State v. Wilson*, 107 Md. 129.

*Judgment reversed, with costs to the appellant.*

Md.]

Opinion of the Court.

JOE BRENNER, TRADING AS RELIABLE JUNK COMPANY  
AND THE OCEAN ACCIDENT & GUARANTEE  
CORPORATION, LTD.

vs.

TOBA BRENNER AND MARY BRENNER.

*Statutes: construction; intent. Employers' Liability Act: appeals; insurance carrier; jurisdiction; foreign corporations; doing business in State; courts having jurisdiction over.*

The cardinal rule in the construction of statutes is to ascertain the legislative intent, as expressed in the words of the statute; and for this purpose the whole Act must be construed together. p. 193

The real intent, when ascertained, will always prevail over the literal sense of the language used. p. 193

The object and purpose of Ch. 800 of the Acts of 1914—the Employers' Liability Act, sec. 56 of Art. 101, Bagby's Code, Vol. III—was to provide a speedy and inexpensive method by which, in the case of injuries to employees, compensation might be made to them, or to those depending upon them, with-

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out delay of long litigation and at a minimum of cost; and to substitute a more nearly uniform scale of compensation in such cases than is attainable from the divergent estimates of juries, and to avoid the application of certain well established rules of law, which in some cases have seemed harsh in their operation.

p. 192

The insurance company, insuring against the claims of employees, according to the terms of the law, occupies the position of surety for the employer.

p. 194

The words of section 56 of Article 101 of the Code, giving the right to hear appeals from the decisions of the Commission, to the circuit courts, or law courts of Baltimore City, having jurisdiction over the place where the accident occurred, or over the person appealing from such decision, includes the insurance carrier, as a party interested, to whom the right of appeal is given.

p. 193

For the purpose of an appeal from the finding of the Commission, the insurance carrier can only address itself to the Court having jurisdiction in the county where the insurance was solicited and obtained.

p. 194

The mere fact that the main office of the insurance carrier is located in a distant county does not vest the court of that county with concurrent jurisdiction to entertain such an appeal.

p. 194

A foreign corporation that has complied with the statutes so as to enable it to do business in this State, is amenable to the process of any of the courts in the State.

p. 192

*Decided December 2nd, 1915.*

Appeal from the Superior Court of Baltimore City.  
(DUFFY, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

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## Syllabus.

*George Weems Williams* (with whom were *William L. Marbury* and *William L. Rawls* on the brief), for the appellants.

*Frank G. Wagaman* (with whom was *Albert J. Long* on the brief), for the appellees.

STOCKBRIDGE, J., delivered the opinion of the Court.

The primary question presented on this appeal is the correctness of a ruling of the Superior Court of Baltimore City, as to the jurisdiction of that Court to entertain an appeal which had been taken to it from an award of the State Industrial Accident Commission.

The facts, so far as they are necessary to be now considered, are as follows:

The Reliable Junk Company was engaged in conducting a business such as the name implies, in Hagerstown, Washington County. The name was not that of a corporation, but a name for a business which was conducted either by Joe Brenner alone or by him in connection with a Mr. Coffman, or by one or the other or both of these gentlemen in connection with Morris Brenner.

On January 15th, 1915, Toba Brenner and Mary Brenner, the mother and sister respectively of Morris Brenner, filed a claim under Chapter 800 of the Act of 1914 (Workmen's Compensation Act) as dependents of Morris Brenner, the son and brother of the claimants, in which it was alleged that Morris Brenner was an employee of the Reliable Junk Company, and while such employee received injuries resulting in death on the 5th December, 1914. The Industrial Accident Commission by its findings held the business to be that of Joe Brenner, that Morris Brenner was an employee, that he suffered death as the result of an explosion while working for and upon the premises occupied by the Reliable Junk Company, that the claimants were partial dependents and awarded them compensation. The Ocean Accident and Guarantee Corporation, Limited, which had issued a policy and was thus

the insurance carrier of the liability, was made a party to the proceedings. Upon the award being made by the Commission an appeal was taken by the Guarantee Corporation to the Superior Court of Baltimore City, whereupon Toba and Mary Brenner through their counsel moved to dismiss the appeal, which motion was granted, and the appeal dismissed, and it is from such order of dismissal of that appeal, that the case has been brought to this Court.

The question presented by the motion is one of jurisdiction only. To sustain that jurisdiction the appellants rely upon section 55 of the Act, codified as section 56 of Article 101 of the Code, and particularly upon the following language in said section:

"Any employer, employee, beneficiary or *person feeling aggrieved by any decision* of the Commission affecting his interests under this Act may have the same reviewed by a proceeding in the nature of an appeal and initiated in the Circuit Court of the County, or in the common law courts of Baltimore City, having jurisdiction *over the place where the accident occurred or over the person appealing from such decision*, and the Court shall determine whether the Commission has justly considered all the facts concerning injury, whether it has exceeded the powers granted it by the Act, whether it has misconstrued the law and facts applicable to the case decided."

The argument is, that inasmuch as jurisdiction to entertain such appeal is conferred upon the Court having jurisdiction over the person appealing from such decision, and that appeal in the present case having been taken by the insurance carrier, a corporation, the agent of which is within the jurisdiction of the Superior Court, therefore, that tribunal is clothed with power to entertain the appeal.

It is also true that the Insurance carrier, in this case a foreign corporation which has complied with the statutes so as to enable it to do business in this State, is amenable to the process of any of the Courts of this State. It is necessary,

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therefore, to determine if possible the intent of the Legislature in the passage of the Act upon this subject.

By section 60 of the Act it was provided that, "the rule that statutes in derogation of the common law are to be strictly construed, shall have no application to this Act; but this Act shall be so interpreted and construed as to effectuate its general purpose."

The rules of statutory construction have been laid down in this State in the following language: "The cardinal rule in the construction of a statute is to ascertain the intention of the Legislature as it is expressed in the words of the statute, and for this purpose the whole of the Act must be considered together." *Mitchell v. State*, 115 Md. 360; *Healy v. State*, 115 Md. 377; *Purnell v. State Bd. of Ed.*, 125 Md. 266. And "the real intent when ascertained will always prevail over the literal sense of the language." *Cutty v. Carson*, 125 Md. 25-33, and cases there cited.

While the legislation of this character is of recent growth in this country the end sought to be accomplished is thoroughly well understood. The object and purpose of such legislation has been two-fold: first, in cases of injury to employees to provide a speedy and inexpensive method by which compensation might be made to them or those dependent upon them without the delay of long and tedious litigation, and at a minimum of cost; and secondly, to substitute a more uniform scale of compensation in cases of accident than could be obtained from the varying and often widely divergent estimates of juries, and also to avoid the application of certain well established rules of law, which in some cases have seemed to be harsh in their operation.

It will have been observed that by the provisions of section 56, already quoted, a right of appeal is given to the Court having jurisdiction over the place where the accident occurred. In most instances that is also the tribunal having jurisdiction of the employer and employee, and certainly is the jurisdiction in which most, if not all, of the witnesses would be resident, and their evidence therefore the most

easily obtainable. Then follows the language upon which the appellants rely: "over the person appealing from such decision." This is undoubtedly sufficiently broad in terms to include an insurance carrier, for such carrier is clearly a party interested, but was that carrier, the office of which might be in a distant part of the State, to be entitled to claim that the location of its main office was likewise to be vested with a concurrent jurisdiction? This Court looking to the general intent of the statute as set out in section 60 cannot come to that conclusion.

The persons concerned, and with whom the Act had primarily to do, were the employer and employee; the insurance carrier occupies the position of a surety for the employer, to secure the fulfilment of any liability which may be determined to have arisen. In this case the employer and employee were residents of, and the place of the accident was, in Washington County. Joe Brenner, it is true, was joined as an appellant, but he was such only in name and was not personally within the jurisdiction of the Superior Court of Baltimore City, and for this reason the addition of his name as an appellant can give no added force to the appeal which was attempted to have been taken. The insurance by the Ocean Company was solicited and obtained in Washington County, and there can be no injustice in holding that the company which solicits and obtains insurance in a county shall, if it desires to appeal from the award of the Commission, do so in the jurisdiction where it had obtained the business.

There is another consideration which cannot be overlooked. Section 15 of the Act provides how an employer shall secure compensation to his employees, and the first of these methods is "by insuring and keeping insured the payment of such compensation in the State Accident Fund." Then follow the provisions for in like manner insuring the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this State. In a case like the present,

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## Opinion of the Court.

if the Reliable Junk Company had adopted the first method of securing the compensation, that is by insuring and keeping insured the payments of such compensation in the State Accident Fund, can there be any doubt, that if the State had deemed the action of the Commission in its award as erroneous, and desired to appeal therefrom, such appeal would have had to be made in the Circuit Court for Washington County, and not to the Circuit Court for Anne Arundel County, or any of the Courts of Baltimore City? If not, by what process of reasoning can it be successfully claimed that a stock corporation or mutual association, which has undertaken to secure the payment of the compensation awarded, stands in any other or different position as to jurisdiction, for the purposes of an appeal, from what the State itself would? Will any one contend that a corporation doing business within the State by license of the State is entitled to any other or higher right than the sovereign State itself?

A further argument has been made based upon an assumed greater convenience, and it has been urged that inasmuch as the Industrial Accident Commission sits in the City of Baltimore, that therefore there should be a jurisdiction in the Courts of the city to review on appeal its findings. This contention is without force. By the terms of the Act the Commission is given power to take depositions within or without the State, section 7. The Courts of the State may take the evidence of witnesses living outside of the State by commission duly issued, but except in a very limited class of cases not those of witnesses who reside within the State, thus distinguishing the powers of the Commission as compared with those of the Court, and this causes the argument of convenience to fail.

For the reasons indicated, this Court entirely concurs in the action of the Superior Court of Baltimore City in dismissing the appeal.

In addition to the question of jurisdiction a number of matters were brought to the attention of the trial Court, and

the Court was asked to pass upon them. These included the fact of the dependency of the claimants, which involved a consideration whether the insurer was liable at all upon the policy issued by the Ocean Company; a further question related to the apportionment of the compensation awarded by the Commission, both as to the amount awarded and the time during which payments were to continue. Evidence bearing upon these matters was presented to the Superior Court, and that evidence would also have justified a question whether Morris Brenner, whose death was the foundation of the claim, was an employee or a partner in the business. With the exception of the last named, the issues so attempted to be raised have been presented to this Court, but under the view already indicated upon the question of jurisdiction it is unnecessary to pass upon them, and anything that might be said would be merely *dicta*.

The order appealed from will accordingly be affirmed.

*Order affirmed, with costs.*

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Syllabus.

UNITED RAILWAYS AND ELECTRIC CO. OF  
BALTIMORE

vs.

WILLIAM B. MANTIK.

*Death from negligence: damages under Code, Article 67; pecuniary loss only; death of child; "due care"; primary and contributory: province of jury; electric cars and motor trucks; duty of driver and motorman; speed of cars. Prayers: inconsistent with facts.*

The rights and duties of the operators of electric cars and of motor trucks in their use of the streets are co-extensive and reciprocal. p. 200

It is as much the duty of the motorman to exercise due care in running the cars over crossings, as it is the duty of a motor truck driver to act prudently in the management of the motor vehicle, as it draws near a point of possible danger. p. 200

Where there is some evidence of negligence both on the part of the plaintiff and of the defendant, the question of primary and contributory negligence is properly left for the consideration of the jury. p. 201

Prayers which are inappropriate to the proven facts are properly rejected. p. 203

In an action for damages for the death of a child, who was killed by a collision between the electric car of the defendant corporation and the motor truck in which the child was riding, it was: *Held*, that the expression, "due care of the person accompanying" the child, was not rendered erroneous for vagueness by the fact that both the child's grandfather and the chauffeur were in the motor truck with him, when one of the defendant's prayers had been granted leaving to the jury the fact that the child was riding on the truck "in company with the chauffeur." p. 204

In an action of damages against a railway company for injuries caused by a collision by one of its cars, evidence of the high rate of speed of the car at the time is admissible. p. 205

In an action for damages for injuries resulting in death, brought under Article 67 of the Code, recovery is limited to the pecuniary losses sustained by the plaintiff as the result of such death. p. 205

In an action of that character for the death of a child, evidence may be given that the parents had younger children, for whom the child that was killed used to assist in caring. p. 205

*Decided December 2nd, 1915.*

Appeal from the Court of Common Pleas of Baltimore City. (DAWKINS, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

*Albert Rhett Stuart* and *Arthur L. Jackson* (with whom was *Lee S. Meyer* on the brief), for the appellant.

*George Moore Brady* (with whom were *William Milnes Maloy* and *William Joseph Tewes* on the brief), for the appellee.

URNER, J., delivered the opinion of the Court.

The nine-year-old son of the equitable plaintiff was killed in a collision between his father's motor-truck, on which he was riding, and an electric car of the appellant railway company. The accident occurred on Seventh Street in Highlandtown about five-thirty o'clock on the afternoon of June 20, 1914. As the motor-truck entered Seventh Street from Claremont Street on the west, it was struck by the electric car as it was passing in a southerly direction, and the little

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boy, who had occupied a place between his grandfather and the chauffeur on the seat of the truck, was thrown under the wheels of the car.

The principal questions in the case are: First, whether there is legally sufficient evidence to show that the collision was due to any negligence chargeable to the railway company, and, secondly, whether the proof justifies a judicial determination that the chauffeur operating the truck was guilty of contributory negligence.

No evidence was offered by the defendant, and there is no contradiction in the testimony as to the facts of the case. The motor-truck, weighing, with its load of canned tomatoes, upwards of seven tons, was being driven at a moderate speed as it approached the place of the accident. It was the purpose of the chauffeur to turn north on Seventh Street after entering it from Claremont Street, which terminated at that point. In order to accomplish this movement he intended to drive across the electric railway track, which was located along the middle of Seventh Street, and then proceed northwardly on the right-hand side of that thoroughfare. As he was nearing Seventh Street he sounded his horn and reduced the speed of the truck. There were trees along the sidewalk on the west side of Seventh Street, to the north, which obstructed his view of the track in that direction. The first opportunity he had to look northwardly along the track was when the front wheels of the motor-truck were passing over the gutter extending across the end of Claremont Street, and when the forward end of the truck was distant only six or seven feet from the west side of the railway. The chauffeur then for the first time saw an electric car, with a second one attached, coming southwardly towards the crossing at high speed. The leading car was then approximately forty-four feet from the point at which the truck was about to cross. No signal of the approach of the cars had been given, and no attempt appears to have been made to lower the excessive speed, as shown by the proof, at which they were moving.

In an effort to avoid a collision the chauffeur turned the motor-truck towards the south, but its momentum, which he said there was not time enough to overcome with the brake, carried it partly over the west rail of the track and the foremost car struck it in the region of the left front wheel. The forward portion of the car was thrown off the track as a result of the impact, the rear wheels remaining on the rails. After the collision the front of the car rested against a trolley pole to the east of the track and about seventeen feet distant. The rear car was not derailed. The cars were in charge of a motorman and shopman who hurriedly left the scene of the accident immediately after its occurrence.

Upon the facts thus detailed the Court could not rightfully declare either the absence of primary, or the presence of contributory, negligence. To hold as a matter of law that the running of the electric cars over the street crossing in question, at the immoderate speed shown by the evidence, and without warning of their approach, was not an act of negligence, or that it had no causal relation to the collision, would be manifestly improper; and there was certainly no such obvious and conclusive want of care and prudence in the conduct of the chauffeur as to justify the withdrawal of that issue from the consideration of the jury.

The respective rights of the operators of the electric cars and the motor-truck to the use of the street were co-extensive, and their duties in reference to the observance of precautions against injury were reciprocal. *United Rys. Co. v. Watkins*, 102 Md. 267; *Cooke v. Balto. Traction Co.*, 80 Md. 554. It was just as incumbent upon the motorman to exercise due care in running the cars over the crossing, as it was upon the chauffeur to act prudently in the management of the motor-truck as it drew near to that place of possible danger. A due regard for the interests of those having an equal right to the use of the crossing required that the usual signal should have been given as the cars approached the junction of the streets, and that their speed should have been reduced

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and under ready control, especially as the presence of trees in foliage obstructed the view of the track from the position which the drivers of motor-trucks and other vehicles are accustomed to occupy. If such a degree of care had been observed in the operation of the cars, it appears reasonably probable, from the evidence, that the collision would have been obviated. When the chauffeur could for the first time see the cars, and when the motorman first saw, or could have seen the motor-truck, the cars were distant about forty-four feet, and the truck not over seven feet, as already noted, from the point where they would collide unless the onward course of either the cars or the truck was arrested. The absence of any warning signal of the cars' approach might naturally have induced the chauffeur to proceed further than he would otherwise have gone towards the crossing, and the "full-speed," as described by one of the witnesses, at which the cars were moving, doubtless made it impossible for the motorman to prevent the collision, by checking the motion of the cars in the time and space available, after the danger became apparent. As the case is presented by the record, we can have no doubt that the issues of primary and contributory negligence were questions of fact for the jury, and that they should not be determined as a matter of law by the Court. *Consolidated Ry. Co. v. Rifcowitz*, 89 Md. 342.

It is insisted on behalf of the defendant that the chauffeur saw the oncoming cars when the truck was in a position of safety and under such control that it could have been stopped in time to avoid the accident, and that it was driven onward in the hope that it might clear the crossing ahead of the cars. Upon this theory as to the facts, it is urged that the speed of the cars, and the failure of the motorman to give signals, did not constitute the proximate cause of the collision, and hence should be disregarded as a ground of liability. The position into which the front car was forced, and the fact that the child was thrown under the car, are circumstances which are said to support the view that the truck

ran into the side of the car as the result of an attempt by the chauffeur to drive over the track before the car reached the crossing, and of a miscalculation on his part as to the time available for that purpose. The difficulty with this theory is that in order to adopt it, as legally controlling in the case, we should have to ignore the positive proof to the contrary. The chauffeur and other witnesses testified explicitly that the car collided with the left side of the truck as the latter was being turned to the right. It would be competent for the jury, in reaching its conclusion, to consider the particular conditions to which the defendant refers, but they are not sufficiently convincing to be regarded by the Court as determining factors in the case and as destroying the probative force of the testimony given by the eye-witnesses.

Upon the question as to the ability of the chauffeur to avoid the collision by arresting the movement of the motor-truck after he saw the cars approaching, the defendant relies upon testimony by the chauffeur to the effect that the front wheels of the truck were in the gutter on the west side of Seventh Street when he first observed the cars, and that the truck could have been stopped within "two feet" by the use of the emergency brake. This was a part, but it was not the whole of the chauffeur's testimony on that subject. He repeatedly stated that the use of the brake would not have enabled him to stop the truck in a place of safety. By his estimate the distance from the middle of the gutter to the west rail of the track was four or five feet, and the truck extended three or four feet beyond the front axle. The point he was trying to emphasize was that the truck was too near the railway for him to avoid a collision by using the brake, although he did use it as a last resort, and that the only way by which he could hope to prevent the accident was to swing the truck around to the side. This being the clear meaning of his testimony as a whole, we ought not to neutralize its effect by segregating and giving decisive force to an expression which may be supposed to vary from the general

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idea sought to be conveyed. It appears from the affirmative and uncontradicted evidence in the case that the chauffeur made prompt and strenuous efforts to avoid the collision as soon as he was aware of the danger, and we could not justly hold, upon this record, that he was guilty of negligence contributing to the unfortunate event. There is no prominent and decisive act of negligence proved, in reference to the chauffeur's conduct, which would require such a conclusion. *United Rys. Co. v. Ward*, 113 Md. 655; *Taxicab Co. of Balto. v. Emanuel*, 125 Md. 259.

The Court below refused to grant instructions to the jury, as proposed in varying forms, by the defendant's first, second, third, sixth, seventh, eighth, eighteenth and nineteenth prayers, that there was no legally sufficient evidence to entitle the plaintiff to recover, or to show that the accident was caused by any negligence of the defendant's employees; and declaring also that contributory negligence on the part of the chauffeur was established by the proof. In this ruling we fully concur.

The defendant's fourth and fifth prayers sought to have the jury instructed that there was no legally sufficient evidence to show that after the truck reached a point of danger, the motorman in charge of the cars could have prevented the collision by the use of ordinary care, and the verdict should therefore be for the defendant. This prayer was inappropriate to the proven facts, and its rejection was clearly proper.

The ninth, tenth, eleventh, twelfth, thirteenth and fourteenth prayers of the defendant were granted. They fully and correctly submitted the issues of primary and contributory negligence to the jury.

There was no evidence to support the main theory of the defendant's fifteenth prayer, and a special exception on that ground was properly sustained.

By its sixteenth prayer the defendant asked a direction that a verdict be rendered in its favor if the jury found that the collision was caused by the failure of the chauffeur to

apply his emergency brake when he first saw the cars approaching. The testimony of the chauffeur was emphatic and undenied to the contrary, and his instant and diligent effort to escape the danger indicates that he was anxious to employ the most practicable means to that end. Under such circumstances, and upon the evidence before us, it could not fairly be held that the chauffeur's decision, in the stress of the emergency by which he was suddenly confronted, to use the steering wheel instead of the brake to accomplish the object for which he was striving, should be treated as a controlling factor in the determination of the question as to the right of recovery.

Two instructions were granted at the instance of the plaintiff. The first permitted a verdict in his favor if the jury should find that the death of his son resulted from the want of ordinary care on the part of the defendant's motorman, provided it were found that the accident could not have been avoided by the exercise of such care by the child as might be reasonably expected from one of his age, or by the use of ordinary care and caution by the "person accompanying" the child. While both the grandfather of the little boy and the chauffeur were with him at the time of the accident, any question which might have arisen in the minds of the jury as to who was intended by the prayers as the "person accompanying" him, would have been answered by a granted prayer of the defendant which instructed the jury that if the chauffeur was guilty of negligence directly contributing to the accident, and if the son of the plaintiff was riding in the truck at the time "in company with the chauffeur," and with the consent of his father, then the negligence of the chauffeur, if found, would entitle the defendant to a verdict. No criticism of the plaintiff's prayers in other respects was suggested in the argument, and we do not think they were open to any valid objection.

There are six exceptions yet to be disposed of, relating to the admissibility of certain testimony. The first, second and

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third refer to descriptions of the high rate of speed at which the cars were traveling as they approached the place of the collision. The propriety of the admission of this testimony, as given by the witnesses of the accident, is fully supported by the ruling of this Court in *United Rys. Co. v. Ward*, 113 Md. 649.

The testimony to which the fourth and fifth exceptions were reserved was subsequently stricken out by the Court on its own motion.

The sixth exception was taken to the action of the Court in allowing the plaintiff, over the defendant's objection, to state the number and ages of his other children. It was the evident purpose of this testimony, in connection with that which immediately followed, to show that the plaintiff had smaller children who, in the lifetime of the deceased son, had been entrusted to his care after school hours, the expense of an attendant being thus saved and the mother left free during that period to aid her husband at his canning factory. The facts thus proven were directly pertinent to the question as to the extent of the pecuniary loss sustained by the plaintiff in consequence of his son's death, and as the right of action in such cases is based upon the theory that recovery is limited to a loss of that character, we see no reason why the evidence excepted to, when offered for the specific purpose mentioned, should be excluded. *Code*, Art. 67, sec. 2; *Coughlin v. B. & O. R. R. Co.*, 24 Md. 84; *Agricultural and Mechanical Assoc. v. State*, 71 Md. 100; *Tucker v. Johnson*, 89 Md. 479; *Elder v. B. & O. R. R. Co.*, 126 Md. 497.

*Judgment affirmed, with costs.*

ROBERT M. STEIN

*vs.*SAFE DEPOSIT & TRUST COMPANY OF  
BALTIMORE, TRUSTEE.AMY STEIN, ELSIE STEIN BLONDHEIM AND  
ADOLPH BLONDHEIM*vs.*SAFE DEPOSIT & TRUST COMPANY OF  
BALTIMORE, TRUSTEE.

*Trusts and trustees: no power to alter terms of trust; discretion and powers; when—are personal; substituted trustees; acceleration of time for appointment. Wills: interpretation; —from language used.*

Trustees have no power to alter the nature and object of the deed or will appointing them, or under which they derive their powers, nor to dispense with the exact performance of the conditions imposed upon them. p. 215

The directions of a testator, when plain, unambiguous and in violation of no established principle of law, must of necessity prevail. p. 217

In interpreting wills, the question of intent is to be sought from the language used by the testator; it is not a question of what the testator may have meant, but simply what is the meaning of the words he used. p. 215

Nor does any such power reside in a court of chancery. p. 215

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Where power is given to an executor or trustee by reason of special confidence in the individual, or to be exercised only upon their personal judgment or discretion, no such power will pass to a substituted trustee. p. 214

By his will, M. S. left his estate to his wife and certain other trustees in trust, with certain broad and discretionary powers, and further provided that upon the *death* of his wife, the other trustees were to assign and convey the trust estate to the Safe Deposit and Trust Company, for the purposes of the trust; it was also provided that in the event of the estate *passing into the hands* of the said Trust Company, the discretionary powers theretofore given to the trustees should be exercised by the President of the Trust Company alone: *Held*, that upon the *resignation* of the wife (the other trustee having died or refused to act), the property was to be conveyed to the Trust Company, and the discretionary powers referred to were to be exercised by its President, in the same manner as would have been the case upon the wife's death. p. 214

The creator of a trust has full power to provide for the appointment of a successor or successors in the trust, in case the original trustee refuses to act, dies or is removed. p. 212

If the substitution of a new trustee is provided for in the will, either by naming the person to be substituted trustee, or by giving the power of appointment to another person, the substituted trustee, named in accordance to such provisions, takes under the will and derives the power to act from the testator. p. 212

The discharge of the duties of a trustee with relation to the trust may be performed by such substituted trustee, even though such substitution was made at a different and earlier time from that which the testator or creator of the trust contemplated. p. 213

The acceleration of legacies under certain conditions has long received judicial sanction. The same principle may be applied to the administration of a trust. p. 213

In general, and unless the intention of the testator appears clearly to be otherwise, where any of several trustees disclaim,

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the remaining trustees or trustee will not only take the entire legal estate, but also all the powers and authorities vested in the trustees as such, and which are requisite for the administration of the trust. pp. 213, 214

Equity will never allow a trust to fail for lack of a trustee.

p. 213

Where a provision in a will leaving property in trust declared that in the discretion of the trustees, the portion of one of the *cestuis que trustent* should, under certain conditions be paid to him absolutely, it applies to the whole of such child's portion, and not to any part less than the whole. pp. 216-217

*Decided December 7th, 1915.*

Cross-appeals from Circuit Court No. 2 of Baltimore City.  
(HEUISLER, J.)

The facts are stated in the opinion of the Court.

The two causes were argued together before BOYD, C. J., BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

*L. Edwin Goldman*, for Robert M. Stein.

*Joseph N. Ulman* (with whom were *Saml. J. Harman*, *Chas. H. Knapp*, and *Clarence A. Tucker*, on the brief), for Amy Stein *et al.*

*Eli Frank* (with whom were *German H. H. Emory* and *C. John Beeukwes*, on the brief), for the Safe Deposit and Trust Company, Trustee.

STOCKBRIDGE, J., delivered the opinion of the Court.

Michael Stein, who had been the head of a banking firm in the City of Baltimore for a number of years, died on January 24th, 1903, leaving a last will and testament. His family consisted of his widow, Emma Stein, three daughters and one son. By his will, which bears internal evidence of

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unusual care in its preparation, he left, after two charitable bequests, certain carefully described property to his wife, and then the balance of his estate was directed to be treated as a residue, which was given to his wife Emma Stein, his brother Simon Stein and Bernard Blimline, in trust, to collect the income, and after the payment of necessary expenses "to pay to my wife in each and every year during the term of her natural life, except as hereinafter limited, one-third of the net income thereof, and to pay the balance or remainder of the net income share and share alike to my children \* \* \* and from and immediately after the death of my wife then the survivor or survivors of said trustees, in further trust, to assign, transfer and convey my estate or so much thereof as shall still be held in trust to the Safe Deposit and Trust Company of Baltimore."

By the next succeeding clause he gives, devises and bequeaths the estate so to be transferred to the Safe Deposit and Trust Company, in trust, to carry out certain trusts particularly set out. Then follows the clause which has given rise to this litigation, and which is as follows:

"8. Notwithstanding the trusts hereinbefore declared of and concerning my estate, I empower my Trustees, Emma Stein, Simon Stein and Bernard Blimline, and the survivors or survivor of them, or a majority of them, to assign and convey absolutely to my son when my son shall attain the age of twenty-one years or at any time thereafter, two-fifths of my estate, if in the judgment of said trustees the survivors or survivor of them, or a majority of them it shall at any time appear to be for the benefit and advantage of my son to receive said two-fifths of my estate absolutely, and also to convey and assign absolutely to my son his share in the corpus of my estate as ascertained and determined by Item 7, Section B, of this will in the event of any of my daughters dying without leaving issue living at the time of her death, but in no event to convey and assign such share until after the death of my wife.

"It is my will and intention by this provision to give said trustees full discretionary power to act so that the best interests of my son will be thereby secured, I desire expressly to state that I grant this power to said trustees to give my son a greater share of my estate than each of my daughters will receive not by reason of any preference I have for him, but inasmuch as I think he should receive sufficient capital to enter into business, if he proves himself capable and so desires. In the event that my estate shall have passed into the hands of the Safe Deposit and Trust Company and my son shall not have received his share of my estate absolutely under this provision of my will, then I desire the discretionary power herein granted to vest in the president of said company, and Simon Stein and Bernard Blimline, or the survivor of them, or should both be dead, in the president of said company alone."

The Simon Stein referred to, and appointed as trustee, died before the death of the testator, and by a codicil the testator appointed Simon H. Stein an executor and trustee in the place of Simon Stein, and conferred upon him the same powers, duties and obligations as were imposed by the will upon Simon Stein.

Prior to the completion of the administration Bernard Blimline was relieved by the Orphans' Court from acting as executor, and when the estate came to be passed over from the executors to the trustees, Mr. Blimline renounced the trust and refused to act; the duties of the conduct of the trust were then performed by the two remaining trustees, Emma Stein and Simon H. Stein, until the death of the latter in September, 1913. Mrs. Stein continued to act as sole trustee from then until January, 1914, when she was relieved on her own application, by an order of Court. A little later, on April 25th, 1915, the Safe Deposit and Trust Company was appointed as trustee in her place and stead.

On March 6th, 1915, the Safe Deposit and Trust Company filed a petition reciting the history of the estate, pray-

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ing the Court to assume jurisdiction of the administration of the trust, and construe certain clauses of the will. From this petition it appears that Robert M. Stein, the son of Michael Stein, had applied to the Trustee to have paid over to him the sum of \$10,000, under what he claimed to be the provision of the clause of the will previously quoted. The \$10,000 so asked to be paid over was not the "two-fifths" of the estate of Michael Stein, but was in reality only about one-tenth of the two-fifths.

The questions presented for consideration are two: Has the discretionary power given by the will now become vested in the president of the Safe Deposit and Trust Company, or does it remain in abeyance until the death of Mrs. Emma Stein; and second, Whether, if such power exists, it could be exercised only as to two-fifths of the estate, and not to any smaller portion thereof.

By an order of the Circuit Court the case was referred to Mr. Coe as Master in Chancery for examination and report, and his report filed in September, 1915, is a most elaborate and carefully considered discussion of the case, in which he reaches the conclusions that the discretionary power is now vested in the president of the Safe Deposit and Trust Company of Baltimore, and that the said power can be exercised only as to the two-fifths of the trust estate, but not to any smaller portion thereof.

On this report a decree was passed which has been appealed from by the son, Robert M. Stein, in so far as it holds that the power can be exercised only as to two-fifths of the estate, and not to the smaller fractional part, which was asked for by him; and the daughters of Mr. Stein have appealed from that portion of the decree which holds the discretionary power to be now vested in the president of the Safe Deposit and Trust Company.

An elaborate discussion of these questions seems hardly necessary. Upon the first question the rule laid down in *Hill on Trustees*, pp. 226, 227, is that: "Where one of two or more trustees disclaims, the remaining trustee or trustees

will take not only the entire legal estate, but also all the powers and authorities vested in the trustees as such, and which are requisite for the administration of the trust."

In the present case we find that of three named trustees, one has died, one never accepted the trust but refused to qualify for its execution, and the remaining one has by her own act been excused from further acting as such trustee. It has already been pointed out that Mr. Stein in his will made provision for a transfer of the trust from the trustees first named to the Safe Deposit and Trust Company as a successor in the office of trustee. It is true that no transfer appears from the record to have been made to the Safe Deposit and Trust Company in strict accordance with the terms of the will, but we have a case where the Court of Chancery has appointed as trustee the corporation which was named by the testator in his will as the body which he wished to succeed to the conduct of the trust after the individuals named. Therefore, much of what was said in *Preston v. Safe Deposit and Trust Co.*, 116 Md. 211, with regard to the exercise of a power of sale given by a will under an assumed grant of authority from a decree of Court, is applicable in this case, and there is presented a situation in which the language in *Yates v. Yates*, 255 Ill. 66, is peculiarly applicable, when it says: "The creator of a trust has full power to provide for the appointment of a successor or successors in trust, in case the original trustee refuses to act, or dies, or is removed by a Court of competent jurisdiction. \* \* \* If the substitution of a new trustee is provided for by the author of the trust, either by naming the person to be substituted, or giving the power of appointment to another, when the provision for succession is duly followed the substituted trustee takes under the will and derives the power to act from the act of the testator. Upon the appointment being made under the power, the new trustee becomes vested *ipso facto* with the title to the trust premises and is clothed with the same power as if he had been originally named in the will."

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The distinction between that case and the present lies only in the fact that the succession of the Safe Deposit and Trust Company to the trust created by the will of Michael Stein was not in strict accordance with the provisions of that will, the departure being that no conveyance appears to have been made as provided in the will, and the appointment which was made came, not after the death of Mrs. Stein, but upon her retiring from the execution of the trust, but both upon reason and authority it is difficult to see how that distinction can so affect the powers now possessed by the Safe Deposit and Trust Company as to render the execution of the trust impossible. In *Sells v. Delgado*, 186 Mass. 25, it was held that a discretionary power to convey is not limited to the first named trustees. In the will which was under consideration in that case, two trustees were named, one of them never qualified, and the other died, and a new trustee had been appointed to succeed them. In its facts, therefore, that case closely approximates the present. This situation has been referred to in the brief of counsel as an acceleration, and no authority has been cited as opposed to the suggestion that the discharge of the duties of a trustee with relation to a trust may not be performed by a substituted trustee, even though such substituted trustee had been appointed at a different and earlier time from that which was in contemplation of the testator or creator of the trust. The acceleration of a legacy under certain conditions has long since received judicial sanction. And with even greater reason may a similar doctrine be applied to the administration of a trust, since equity will never allow a trust to fail for lack of a trustee.

No one can be compelled *in invitam* to act as an executor or trustee, and since in the present case of the three trustees named by Mr. Stein in his will, one has died, one never qualified and absolutely refused to act, and the third, after acting for a time, has been relieved from further discharge of the duties upon her own application, unless such acceleration is possible there must inevitably be a period of time in which there is no one clothed with the power to act as

trustee, and discharge the duties of the trust. That such a condition should ever arise was manifestly not for a moment in contemplation of the testator. His provisions were most elaborate and careful, and to hold that a hiatus now exists would be to thwart the perfectly plain intent and desire of the testator. This a Court, and particularly a Court of Equity, will never do. What it seeks to do is to carry out and in so far as possible to give effect to that intention. *Schapiro v. Howard*, 113 Md. 360.

Considerable stress was laid in argument upon the contention that the discretionary power granted was one evidencing a special confidence, and therefore only to be exercised by the trustees originally named in the will. It is true as a proposition of law, that where a power given to an executor or trustee by reason of the special confidence in the individual, or is to be exercised only upon his or their personal judgment and discretion, that no such power will pass to a substituted trustee. *Md. Cas. Co. v. Safe Deposit and Trust Co.*, 115 Md. 344; *Mercer v. Safe Deposit and Trust Co.*, 91 Md. 118. But can this be properly said to have been a trust to be exercised by reason of a special confidence in a particular trustee? The same power, identically, was conferred upon the president of the Safe Deposit and Trust Company. Had Mrs. Stein continued as trustee until the time of her death, and had the assignment been then made by Mr. Blimline to the Trust Company in strict compliance with the terms of the will, there could have been no question but that the full and ample power given by the will was in the president of the Safe Deposit and Trust Company. In the 8th clause, however, the language of the will is, "in the event that my estate shall have passed into the hands of the Safe Deposit and Trust Company," etc. It does not say that from and after the death of my wife, the president of the Trust Company shall have and exercise the discretionary power, but that power was to devolve upon him when the estate passed into the hands of the corporation as trustee. The devolution of power must, therefore, be regarded as com-

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plete and in accord with the clear, unmistakable intent of the testator.

There remains the second of the two questions; namely, whether the discretion of the trustee is one to be exercised solely as regards the two-fifths of the estate, or whether that discretion is sufficiently broad to admit of payments of a lesser sum. It has long been the settled law in this State that the trustees have no power to alter the nature and object of the deed or will appointing them, or under which they derive their power, nor to dispense with the exact performance of the conditions imposed upon them. Neither has a Court of Chancery that power. *Dolan v. Baltimore City*, 4 Gill, 395. It is necessary, therefore, to look to the provisions of the will in the light of the circumstances surrounding the testator when he made it. In ascertaining that intention of the testator, courts are bound to look to the intent as expressed in the will. The question is not what the testator meant, or may have meant, but simply what is the meaning of the words he used. *Schapiro v. Howard*, *supra*. And that language is to be interpreted according to its plain meaning and import, not by applying some strained or artificial course of reasoning. *Abell v. Abell*, 75 Md. 57.

By express language in section 8, authority is given to the trustees of Mr. Stein in their discretion to assign and convey absolutely to his son, two-fifths of his estate. There is no suggestion that the trust may be performed by a succession of payments on an instalment plan, of less sums than the two-fifths, until they amount in the aggregate to that portion of the trust estate. In the antecedent clauses of the will reference is a number of times made to the provision contained in the clause numbered 8, for the benefit of Robert, and wherever it occurs the language used is invariably "the part of my estate." Throughout the testator refers to it in that manner, and in none other, and in this respect the provisions of the will differ widely from many of the cases cited by the counsel for Mr. Stein on their brief and in their argument.

Thus in the matter of *Wilkin*, 183 N. Y. 104, which arose under the will of James Cunningham, the testator provided that the trustee should pay the amount of the trust fund, \$146,000, to his son Charles, or to his wife or children, at such time or times, *in such sums*, and in such manner as the executor may deem best. This provision clearly contemplated that the payments should be made by instalments, and not in a single lump sum.

The case of *Cooley v. Kelley*, 96 N. E. 642, which arose under the will of Wm. J. Harper, presented a situation where the will in terms provided that the trustee should pay to the testator's son, Thomas, the whole or a part of a certain sum. In *Barrett's Case*, 53 Pa. Sup. Ct. 103, the devise of the \$5,000 for the benefit of the testator's nephew, gave to the trustees the power "to spend said money, principal and interest, in any way and at any time that they may deem proper for the benefit of" the nephew.

Cases of this character, therefore, afford no guide for a situation like the present, where a specific portion of the testator's estate is given to his son, and that gift is elsewhere throughout the will definitely referred to as "the part," without any words or expression to indicate that it was the idea or purpose of the testator that this part was to be treated in a piecemeal manner. Moreover, the effect of the payment of the lesser sum than the two-fifths would operate materially to disarrange the other provisions of the will. No argument will be necessary to establish this fact; it sufficiently appears from the supplementary answer of Robert M. Stein, in which, to obviate the disarrangement which would be produced by the granting of his petition, he tenders four different possible constructions, as they are termed, by which the intent of the testator may be carried out. It has already been remarked that the will itself in this regard is entirely free from any uncertainty or ambiguity. The only manner in which the provisions could be made ambiguous or uncertain, would be by granting the request of Mr. Stein that he be paid \$10,000 at the present time, on account of his two-

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fifths interest in the trust estate. The argument was advanced that since the greater always includes the lesser, therefore, the provision which gave to Robert M. Stein, under certain conditions, two-fifths of the estate, must of necessity give him a smaller fraction thereof. Specious as this argument is, it is none the less fallacious, for the reason that it is not in accordance with the plain, unambiguous direction of the testator, and that direction not being contrary or doing violence to any established principle of law must of necessity control.

The will, by its terms, imposed a wide and important discretion in the trustees or trustee, as to the time of passing to Robert M. Stein, his part, two-fifths, of the estate of the testator. But that discretion was one to be exercised by the trustees or trustee, and is not a matter for review by this Court, unless the exercise of it or refusal to exercise it, is either arbitrary or palpably unreasonable, neither of which conditions are alleged in this case; and, therefore, the Court has no occasion to consider the manner of the exercise of the discretion by the president of the Safe Deposit and Trust Company acting under the power conferred upon the trustees.

For the reasons given, the decree appealed from in each of the cases will be affirmed.

*Decree appealed from affirmed in each case, the costs of both appeals to be paid by the Trustee and charged by it against the corpus of the Trust Estate in such manner that the same shall be ultimately payable out of the share of the children of Michael Stein in proportion to their respective shares in his estate.*

WASHINGTON AND ROCKVILLE RAILWAY COM-  
PANY OF MONTGOMERY COUNTY,

*vs.*

NANCY JOHNSON.

*Corporations: suits against; service of writs; officers, who are—;  
attorneys generally not; effect of Acts of 1912, Chapter  
424, Section 5. Pleading: process; renewals; fail-  
ure to serve; question of discontinuance.*

The attorney of a corporation is not an "officer" of the corporation, within the sense of the statute providing for service of writs upon corporations. p. 221

Section 5 of Chapter 424 of the Acts of 1912, providing for the service of writs upon the attorney of a corporation, relates only to cases of violations of the provisions of that Act, and confers no general authority on such an attorney to accept service as upon an officer of the corporation. p. 221

In general, when the plaintiff leaves a break in the proceedings, as by not continuing the process regularly from day to day, or from term to term, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend. p. 222

But this rule should not be applied, where the plaintiff has a right to have a judicial determination as to whether or not he had succeeded in bringing the defendant into court, before ordering any writ. p. 224

*Decided December 16th, 1915.*

Md.]

Opinion of the Court.

Writ of error to the Circuit Court for Montgomery County.  
(PETER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Wm. H. Talbott* (with whom was *H. M. Talbott*, on the brief), for the appellant.

*Arthur Peter* (with whom was *Julian W. Whiting*, on the brief), for the appellee.

CONSTABLE, J., delivered the opinion of the Court.

This case was brought to this Court upon a writ of error from the Circuit Court for Montgomery County by the Washington & Rockville Railway Company of Montgomery County, plaintiff in error, against Nancy Johnson, defendant in error.

There are four regular trial terms held by the Circuit Court for Montgomery County—January, March, June and November, of which January and June are non-jury terms. By the Act of 1894, Chapter 561, three intermediate return days—the first Mondays in May, August and October—were provided for in addition to the four return days existing previously on the first day of each term. This Act provided that all process was returnable to one of these return days or to the first day of the next term, whichever should first occur, unless otherwise ordered in writing by the plaintiff; and on the return of the original writ not executed the same could be renewed, returnable to the next return day or the first day of the succeeding term, whichever should first occur.

If the defendant, excepting suits on contract, should be served with the writ and should fail to appear on the return day named therein, the Clerk of the Court was directed to enter his appearance on the following day, and place the case upon the trial docket and it stood for trial at the next succeeding term.

The action in this case was in tort for damages growing out of an alleged assault by one of the company's conductors, and was filed in the June term on the 4th day of June, 1913, and on the same day summons was issued for the defendant, returnable on the return day in August. On said return day the Sheriff returned the writ indorsed as: "Served on the Washington and Rockville Railway Company, a corporation, by serving on William H. Talbott, attorney, etc., this 4th day of June, 1913." On the day of said return William H. and Henry M. Talbott had their appearance entered specially to move to quash the return of the Sheriff. On the 21st of August the said attorneys, appearing specially for the purpose of the motion, filed, in writing, a motion to quash the said return, with the reasons therefor, the principal one being that the writ was not served upon a proper officer of the defendant, in that there was a director of the company residing in the State and in fact in Montgomery County. On the 10th day of November next, it being the first day of the November term, the plaintiff filed an order to renew the process; thereupon another writ of summons was issued to the Sheriff, and made returnable to the first day of the January term; and the same was returned endorsed as having been served upon a director of said corporation on the 11th day of November. On the 12th day of November the Court passed an order quashing the original return. On February 4th the same attorneys again appeared specially, and filed a motion to have the case marked discontinued, for the reason that the plaintiff had failed to have the writ, originally issued, renewed from term to term. This motion was overruled, and the defendant excepted; and on the same day

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## Opinion of the Court.

the same attorneys entered their appearance generally for the defendant, expressly reserving any and all rights of the defendant under the prior proceedings. The case was finally tried, resulting in a verdict for the plaintiff; and after a motion for a new trial had been overruled the defendant filed his petition for a writ of error.

The first question which presents itself is, was the Court below correct in quashing the return first made by the Sheriff? By Section 5 of Chapter 424 of the Acts of Assembly, 1912, the defendant company was directed to appoint an officer or attorney with full authority to accept service of summons for the company. It is contended by the defendant in error that, by virtue of this statute, the service upon the attorney was a proper and valid service of her writ. We can not agree with this contention for the reason that the entire act is an attempt to regulate the fares to be charged by the company; and in providing a penalty for a violation of its provisions, makes provision as to the manner in which the company may be served with a warrant. It is clear that the only authority conferred upon the officer or attorney so designated was for acceptance of writs issued for violations of that Act, and not a general authority.

The defendant being a domestic corporation, process against it was governed by Section 87 of Article 23 of the Code. It is therein provided that process against such a corporation may be served on its president, director or other officer, and if none resides in the State, it may be proceeded against by attachment as a non-resident, or such process may be served on any agent or other person in the service of the corporation. It has long been held that an attorney of a corporation is not included in the word officer, and that a summons served upon an attorney where the statute designates an officer is not a good service: *N. C. R. R. v. Rider*, 45 Md. 24. By the statute just referred to, before any agent or other person in the service of the corporation could be served with process for it, it was necessary that the first class mentioned therein

should have been exhausted, and this could not have been while any one of them resided within the State. But the fact was that a director did reside within the State, and, therefore, he was one within the first class upon whom service should have been made, before resorting to those in the second class. The Court was correct, therefore, in quashing the return.

The counsel for the corporation were extremely careful in preserving the rights of the company under their special appearance, and after the overruling of the motion to declare the suit discontinued.

Was, then, the suit discontinued by the failure of the defendant in error to have the writ renewed at the August return day? The plaintiff in error, in support of its contention that it was, relies upon the common law rule, that a suit is discontinued "when a plaintiff leaves a chasm in the proceedings, as by not continuing the process regularly from day to day or from time to time as he ought to do. The suit is thus discontinued, and the defendant is no longer bound to attend; but the plaintiff must begin again, by suing out a new original." *Evans' Practice* (2nd Ed.) 315. Or as it is stated in *Poe's Practice*, section 67: "If the writ of summons is returned not found, it should be renewed to the next succeeding term, and so on, without break, until the defendant is found and summoned. An omission to thus renew will operate as a discontinuance of the action; while on the other hand, the regular renewal of the writ from term to term, without intermission, will keep the suit alive, and prevent the running of the statute of limitations, where that defense had not accrued before the impetration of the first writ."

There can be no question raised against the existence of this rule: *Hazlehurst v. Morris*, 28 Md. 75; *State, use of Nesbitt, v. Logan*, 33 Md. 8; *Hagerstown Bank v. Thomas*, 35 Md. 518; although the tendency of modern decisions is to mitigate its severe rigor in the construction of discontinuances: *Encl. Pleading and Practice*, Vol. 6, page 927. All

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the authorities agree that the rule was instituted to prevent parties from bringing suit and then lying by, maybe for years, and then bringing defendants into court to answer old claims, after witnesses had probably died or had forgotten the fact, and thus work injustice by being deprived of the defense of limitations, unless they could have availed of that at the time of the filing of the action. And there can be no doubt of the wisdom of a rule which makes a plaintiff use diligence in prosecuting a suit begun by him or otherwise compel a dismissal of it. And there are numerous cases where the courts have not hesitated to declare suits discontinued by reason of this lack of diligence. All the cases, however, which we have been able to find, in which the court has declared a suit discontinued have been on the return of *non est* or *tarde*, and none under a defective service. Nor have we found any decisions to that effect where there has been a return day other than that at the beginning of a regular term.

The theory advanced by the plaintiff in error is that these intermediate return days constitute terms, in so far as the return and renewal of process are concerned. That if the service of the writ was ineffectual to bring the defendants into court, that then on the return day of the writ it was necessary for the plaintiff to have the writ renewed, otherwise there would be a break or chasm in the proceeding which would work a discontinuance. It appears to us that although in the present case such a service was made as was defective, because not authorized, that yet it would be carrying this technical rule further than it or the reasons for its adoption would justify, in declaring a suit under the circumstances of this case to have been discontinued. The return was not that the party could not be found, but on the contrary that it had been summoned, and it could not be determined that in fact it had not been brought into court until the court had decided the question raised by the motion to quash. It is true the court could not get jurisdiction of the party by virtue

of the faulty service, any more than jurisdiction could be acquired upon a return of *non est*; but for a settlement of this question we are not concerned with the jurisdiction of the court over the parties, but whether a party has neglected to keep alive a suit duly commenced. If the return had been *non est* and there had been a failure to renew, then there would have been an indication on the part of the plaintiff, irrespective of any rule, to discontinue; but here the plaintiff had a right to have a judicial determination of whether or not he had succeeded in bringing the defendant in the court, before ordering any writ. To hold that a suit would be discontinued under the circumstances of this case would be to hold that upon a question being raised as to the sufficiency of a service the plaintiff would have to immediately order a new writ to issue, or take the risk of the writ being determined defective and thus have to institute new proceedings. We can not give such a construction to the rule, for we are of the opinion that the suit did not discontinue by reason of the failure to renew the summons at the intermediate return day. By the service of the writ issued on November 10th, the court acquired complete jurisdiction and the judgment recovered was accordingly a valid one.

*Writ of error quashed, with costs to the defendant in error.*

Md.]

Syllabus.

MICHAEL WESTERMAN

*vs.*

UNITED RAILWAYS AND ELECTRIC COMPANY  
OF BALTIMORE.

*Negligence: contributory; team and trolley car; crossing in sight of approaching car: rules of city streets and open country; when failure to give signals not actionable negligence; signals to stop for passengers.*

In actions for damages resulting to the plaintiff for injuries sustained by the negligence of the defendant, or of the defendant's agents, the burden rests upon the plaintiff to prove the negligence or want of care causing the accident. p. 227

But if the evidence that the want of ordinary care or prudence on the part of the plaintiff contributed to produce the accident, there can be no recovery, unless there is evidence that the defendant, by the exercise of care and prudence, might have avoided the consequences of the plaintiff's negligence. p. 227

Where a plaintiff, injured by a collision with an electric car, saw the car approaching the crossing in time not to have gone upon the track, the fact that the agents of the defendant failed to ring any bell while approaching the crossing is immaterial. p. 230

The duty as to the operation of electric cars in cities and over cross streets has no application to operating cars in the open country, where it is known that the cars are permitted to be run at much higher speed. p. 231

No rule of law requires a street railway company to stop its cars at all points upon signal to take on passengers. p. 231

*Decided December 16th, 1915.*

Appeal from the Court of Common Pleas of Baltimore City. (DAWKINS, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, UREER, STOCKBRIDGE and CONSTABLE, JJ.

*William Colton*, for the appellant.

*Albert E. Donaldson* and *J. Stanislaus Cook*, for the appellee.

BRISCOE, J., delivered the opinion of the Court.

This is a suit instituted by the plaintiff against the defendant company in the Baltimore City Court, but removed to the Court of Common Pleas of Baltimore City for trial, to recover damages for personal injuries sustained by him, and for certain damages to his property by reason of the alleged negligence of the defendant.

The accident occurred on the 17th of August, 1914, at 8 o'clock in the evening, at the intersection of O'Donnell and Fifteenth streets, a much traveled thoroughfare of Baltimore County. The defendant at this point operates two car lines running north and south from River View, a resort in Baltimore County, to Roland Park and Druid Hill Park, in Baltimore City, commonly known as the River View Line.

At the time of the collision the plaintiff was driving two horses attached to a large wagon, loaded with grain, eastward on O'Donnell street, commonly called Mt. Carmel Road, and while crossing the tracks of the defendant on Fifteenth street was struck by a northbound car of the defendant coming from River View in Baltimore County.

The defendant sustained personal injuries, his wagon was damaged, one of the horses killed and the other injured.

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## Opinion of the Court.

At the conclusion of the plaintiff's case the Court below granted two prayers on behalf of the defendant which instructed the jury, first, there was no evidence legally sufficient to entitle the plaintiff to recover, and, second, that the plaintiff was guilty of contributory negligence and their verdict must be for the defendant.

From a judgment on the verdict in favor of the defendant this appeal has been taken.

There is but one exception in the record, and that is, to the action of the Court at the close of the plaintiff's case in granting the defendant's prayers, withdrawing the case from the jury.

It is well settled law that the burden of proof rests upon the plaintiff in actions of this kind to prove negligence or want of ordinary care on the part of the defendant causing the accident, and if the evidence shows that the want of ordinary care and prudence on the part of the plaintiff contributed to cause or produce the accident, there can be no recovery, unless the defendant, by the exercise of care and prudence, might have avoided the consequences of the plaintiff's negligence.

The rule recognized by the English courts in *Tuff v. Warman*, 94 E. C. L. 583, and adopted by this Court in *Lewis v. B. & O. R. R. Co.*, 38 Md. 599, and since followed by this Court, is thus stated. The question is, "whether the injury complained of was caused entirely by the negligence or improper conduct of the defendant, or whether the plaintiff so far contributed to the same by his own negligence or want of ordinary care and prudence that but for such negligence or want of care and prudence the injury would not have happened. In the first case, the plaintiff would be entitled to recover; in the latter he would not, unless the defendant, by the exercise of care and prudence might have avoided the consequences of the plaintiff's negligence."

In this case, it is argued, and insisted upon on behalf of the plaintiff, that the defendant's motorman was guilty of negligence in the following respects: first, failure to ring the

bell as the car approached the crossing; second, the rapid and increased speed of the car as it approached the crossing; third, the failure to stop the car at O'Donnell street to permit passengers to board the car; and, fourth, the failure to slow down as it approached the crossing, according to the notice, and existence of the blue or green lights below the crossing.

Turning now to the record, it appears that the collision occurred at the intersection of O'Donnell and Fifteenth streets, in Baltimore County. O'Donnell street, more commonly called Mt. Carmel Road, runs east and west, and Fifteenth street, which contains the double tracks of the appellee's street railway, runs north and south. There is an ascending or upgrade on O'Donnell street from Fourteenth street to the crossing and about one block past Fifteenth street. The grade, however, at the crossing is level and is of "T" rail construction. The view at the intersection of the streets is clear and unobstructed and is stated in the testimony as "made up of fields and open country."

On the evening of the accident, the plaintiff was driving his team of horses to a wagon loaded with grain easterly on O'Donnell street, and had to cross Fifteenth street to reach his home, on Sixteenth street.

There were two tracks of the appellee on Fifteenth street, one described as northbound and the other southbound, and to the west of these were the tracks of the Canton Railroad, upon the same street. What occurred when the plaintiff reached the crossing he states as follows: "It was August 17th, I passed there, at 10 or 15 minutes past eight o'clock. I had been driving my grain team from the west to the east up the hill; it is up the hill from west to east—that is, at 15th street; and when I came to the crossing I started to move with the horses—over the crossing—of course, I was going very slow going up the hill, and when I started to cross the crossing I saw the car was very far off on the other side, and there were people standing waiting for the car, and there was a man and a woman, and I saw them keeping the child to

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make ready for the car, and when I had crossed the crossing already—my horses were over on the other side, and they were crossing the two tracks—then came and struck in the middle of the wagon on the front wheel—I can't remember which, and after that I can't remember what happened because I couldn't see."

He testified further there were lights burning at the crossing, and it was very light there; that when he first saw the car it was very far away, but when he got to the first track it was not so far away, but it was running very fast, and he then drove upon the track, and as he saw people there waiting for the car he thought it would stop, and he did not afterwards notice the car until he was struck. He also said, in answer to the following question upon cross-examination: "Q. Where was the last place you stopped your team before going on the railroad track? A. I didn't stop; I was going slow."

He also testified that he saw the car before he attempted to cross, and there were lights both at the crossing and on the electric car.

There was testimony to the effect that there was a waiting station at the crossing and a blue light burning below the crossing, which meant that the car should "slack up," or slow down, at the crossing, but this car increased its speed, as it approached the crossing. There were several persons waiting to board the car, but instead of stopping, it passed beyond the station, and did not stop. There was no evidence as to the speed of the car, except that it was running very fast and rapidly, and did not slack up, as it approached the crossing.

Mrs. Schnagel, who was waiting at the time of the accident, to board the car, testified that she heard the crash at O'Donnell and Fifteenth streets and the car did not slow down, as it approached the crossing, she did not hear the wagon as it approached the crossing, nor did she hear the motorman ring the bell.

The witness Finch testified upon cross-examination as follows: "Q. You say you saw Mr. Westerman first as he passed

you with his team about fifty feet from the crossing? A. Yes. Q. And at the same time the car was coming along at the track? Can you tell us how far away the car was then? A. The car was at least three times the length of the car from the crossing. Q. Three times the car length? A. Yes. Q. Away from the crossing? A. Away from the signal light. Q. How far is the signal light away from the crossing? A. The length of this court room. Q. As a matter of fact, isn't it farther than that? It is a right good distance before you get to the crossing, isn't it? A. It is about 15 or 20 feet. Q. Mr. Westerman kept going and the car kept going until the collision occurred? A. Yes. Q. And then you ran up and rendered what assistance you could? A. Yes.

The witness Schnagel, who saw the accident, testified that he saw the wagon coming up the street with the plaintiff in it, and the car was then in sight. It was then about two hundred or three hundred feet away, and the wagon was then close to the track, and while it attempted to cross the track, it was struck by the car. The lights of the car were burning, and there were a number of lights around the waiting room.

Upon this state of facts, and upon the well settled law applicable to this kind of case, we think the Court below properly withdrew the case from the consideration of the jury.

The failure of the defendant to ring the bell as the car approached the crossing, is immaterial, in this case, because the plaintiff saw and heard the approaching car in time not to have gone upon the tracks and the ringing of the bell would have added nothing to this admonition. *Bacon v. B. & P. R. R.*, 58 Md. 482; *P. & B. C. R. R. Co. v. Holden*, 93 Md. 417; *Glick v. C. & W. Elec. Ry. Co.*, 124 Md. 319.

While there was evidence that the car was running very rapidly, there was no evidence to show that the speed was either excessive or dangerous in the locality where the car was being operated.

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In *Sparr v. United Rys. Co.*, 114 Md. 320, it is said, the appellant relies upon the class of cases to which the recent case of *United Rys. and Electric Co. v. Ward*, 113 Md. 649, and *U. R. & E. Co. v. Watkins*, 102 Md. 267, belong. But as has been frequently stated by this Court, those cases have no application to accidents occurring in the open country where cars are known and permitted to run at a much greater speed than is permissible on the crowded thoroughfares of a city, where those in charge are not required to reduce the speed of the car as they approach a road crossing, and where more caution is therefore demanded of persons, in crossing the tracks."

The third and fourth grounds relied upon by the appellant to establish actionable negligence, upon the part of the appellee, we think, are without merit, under the facts of this case.

There is no rule of law, which requires a street railway company to stop its cars at all points upon signal, to take on passengers.

In *Winchell v. St. Paul City Ry. Co.*, 86 Minn. 445, the Supreme Court of Minnesota, in dealing with a similar question, said: "We are not aware of any rule making it the absolute duty of a street car company to stop its cars upon the signal of a person wishing to take passage thereon. It is usual and customary no doubt, to do so, but it cannot be said to be an absolute duty. It is a matter of common knowledge that frequently, where cars are already overloaded with passengers, the motorman takes no notice of persons signaling an intention or desire to take passage, and passes them without any effort to come to a stop." *Maxey v. Metropolitan St. Ry. Co.*, 95 Mo. App. 303; *Fenton v. Second Ave. Rwy. Co.*, 126 N. Y. 625; *Hayes v. United Ry.*, 124 Md. 687.

But admitting that the defendant motorman was negligent in failing to slow down the car upon approaching the crossing as indicated by the green or blue light, we think the evidence shows that the plaintiff was guilty of negligence contributing to the accident, and there can be no recovery.

In *Heying v. U. Rwy. Co.*, 100 Md. 281, we said, if the plaintiff was guilty of contributory negligence, the question of negligence *vel non* on the part of the defendant becomes immaterial, for if there was no negligence on its part there can be no recovery, and if there was, the same result would follow, because of the plaintiff's contributory negligence.

In *McNab v. United Rys. Co.*, 94 Md. 719, the Court said, no matter how negligent the company's servants may have been in failing to give signals or warnings of the approach of the car to the crossing, Mrs. McNab after she saw the danger of leaving a place of safety and of attempting to cross directly in front of the rapidly moving car, was, when she drove forward, equally guilty of negligence which immediately contributed to the infliction of the injury which she sustained; and that contributory negligence is a bar to a recovery on her part.

In *Meidling v. United Rys. Co.*, 97 Md. 75, a somewhat similar case, we held that the plaintiff was guilty of contributory negligence, and said: "Here as in *McNab's case*, we have an electric railway running through the open country with a T rail construction. It is evident from all the evidence that we have here as there a rapidly approaching car, in the sight of the traveller, who in spite of the fact that he saw it, drove leisurely on the track and was run over and killed."

The cases of *Hatcher v. McDermott*, 103 Md. 78; *United Rys. v. Durham*, 117 Md. 192; *Glick v. C. & W. E. R. Co.*, 124 Md. 308, and the cases cited therein, are to the same effect.

We find nothing in the facts of the present case to take it out of the rules of law, applied and established by the cases cited, and as the plaintiff's negligence, was the last and final negligent act, the judgment of the Court below will be affirmed.

*Judgment affirmed, with costs.*

Md.]

Syllabus.

LAURA PATTERSON ET AL.

*vs.*

MAYOR AND CITY COUNCIL OF BALTIMORE.

*Article 3, section 40: Constitution; taking of private property; jury trial, may be given to both parties; appeals.. Condemnation of land: value; evidence; sales of similar lands; discretion of trial court. Prayers: mere abstractions of law. New trials: discretion of court.*

Section 40 of Article 3 of the Constitution of Maryland, prohibiting the taking of private property for public use without just compensation as agreed between the parties, or awarded by a jury, does not prohibit the enacting of laws conferring such right of a jury trial upon other, or all, parties to condemnation proceedings. pp. 235-236

Under such section of the Constitution, the Legislature may confer the right to a jury trial upon the Mayor and City Council of Baltimore, even in a case where the appeal was taken by the other party. pp. 237, 238

The provision in section 179 of the Charter of Baltimore City (Chapter 123 of the Acts of 1898), to the effect that the "persons" appealing to the City Court from the amounts of assessments or damages allowed in condemnation cases shall be secured in the right of a jury trial," applies as well to the City as to the landowner. p. 236

In such proceedings, the City is entitled to a jury trial, even though the appeal was taken by the other party. pp. 237, 238

Prayers that submit to the jury mere abstractions of law are erroneous and should be refused. p. 240

In establishing the value of lands, the prices realized at sales of similar lands in the vicinity, made within a reasonable period of time theretofore, at voluntary and not forced sales, are admissible in evidence. p. 241

The determination of the degree of similarity that must exist, in order to admit such evidence, and the nearness in respect to time and place, must largely be left to the discretion of the trial judge. p. 241

In determining the value of lands taken by condemnation proceedings for the opening of streets, etc., the possibility of a car line being constructed upon the street to be opened, is too speculative to be considered. p. 242

In general, no appeal lies to the Court of Appeals from the refusal of the lower court to grant a new trial. p. 242

*Decided December 16th, 1915.*

Appeal from the Baltimore City Court. (GORTER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Arthur W. Machen, Jr., and Ward B. Coe, for the appellants.*

*S. S. Field, City Solicitor, and George Arnold Frick, Assistant City Solicitor, for the appellees.*

PATTISON, J., delivered the opinion of the Court.

We are called upon by this appeal, to review the rulings of the Baltimore City Court at the trial of the appeal taken by Laura Patterson and Sidney T. Dyer and Laura Patterson, Trustee, appellants in this Court, from the award of the Commissioners for Opening Streets in the City of Baltimore, by which damages were awarded and benefits were assessed

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to said appellants in the matter of the opening of Twenty-fifth street from the east side of Greenmount avenue to the west side of Harford avenue, under Ordinance No. 416 of the Mayor and City Council of Baltimore, approved December 9th, 1909.

The first question presented by the record is, whether the city was entitled to have the issues presented by the aforesaid appeal to the Baltimore City Court tried by a jury.

The petitioners having waived their right to a trial by jury asked that the issues be tried by the Court, whereupon the City, through its solicitor, announced that it had not waived its right to a jury trial, and asked that a jury be empanelled to try the case. The Court overruled the application of the petitioners, and, as directed by the Court, a jury was empanelled, and the case tried by it.

It is contended by the appellants that in these cases the right of trial by jury, under the Constitution and statutes of this State, is lodged only in the landowners and that the City has no such right, either under the organic or statute law of the State.

The Constitution of Maryland, *Section 40, Article 3*, provides that "the General Assembly of Maryland shall enact no law authorizing private property to be taken for public use without just compensation as agreed upon between the parties or awarded by a jury."

This section of the Constitution, in respect to the question here raised, has never been passed upon by this Court, and so far as we are able to discover, such question has never been presented for its consideration.

The counsel in the case have cited expressions of this Court found in its previous opinions, in support of their respective contentions, but such expressions, we think, fail to show any decided views upon the question, and we think it unnecessary to pass upon it at this time in deciding the questions presented by this appeal. The inhibition found in this clause of the Constitution does not prohibit the enactment, by the Legislature, of a law conferring such right of

jury trial upon other, or all, parties to condemnation proceedings.

By the City Charter (Chapter 123 of the Acts of 1898), the Commissioners for Opening Streets are charged with the duty of "opening, extending, widening, straightening or closing any street, lane, alley or part thereof situated in Baltimore City whenever the same shall be directed by ordinance to be done," and in so doing they are to assess benefits to those who are benefited thereby, within the meaning of the statute, and are to award damages to those whose lands are taken for such public use.

It is further provided by the Charter (Section 179) that "the Mayor and City Council of Baltimore or any person or persons, or corporations, who may be dissatisfied with the assessment of damages or benefits, as hereinbefore provided, may \* \* \* appeal therefrom by petition, in writing, to the Baltimore City Court, praying the said Court to review the same, \* \* \* and the said City Court shall have full power to hear and fully examine the subject, and decide on the said appeal, \* \* \* and the persons appealing to the Baltimore City Court, as aforesaid, shall be secured in the right of a jury trial, and the said Court shall direct the Sheriff of Baltimore City to summon twelve or more persons qualified to be jurors, and shall empanel any twelve disinterested persons, so summoned, or attending the Court, to try any question of fact, and, if necessary to view any property in the City, or adjacent thereto, to ascertain and decide on the amount of damage or benefits, under the direction of the Court."

Prior to the Act of 1898, the right of appeal to the City Court from the action of the Commissioners for Opening Streets was not given by statute to the Mayor and City Council, but was confined to those generally termed in such proceedings as the "land owners," or those to whom benefits are assessed or to whom damages are awarded, but by the present City Charter, Section 179 aforesaid, such right of appeal is also conferred upon the Mayor and City Council.

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It is, however, contended by the petitioners that although the right of appeal is lodged in the city, the right of a jury trial is not conferred upon it by the statute, even though the appeal be taken by the City. This contention is based upon the expression in the statute that "the *persons* appealing to the Baltimore City Court, as aforesaid, shall be secured in the right of a jury trial," it being contended by the petitioners that the Mayor and City Council, a municipal corporation, is not included in the term *persons*, and therefore no right of jury trial is conferred upon it.

It is said in *Lewis on Eminent Domain* (3rd Ed.), sec. 790, that "as the right of appeal is conferred by statute, every appeal must find its warrant in the statute. In statutes granting appeals the words 'persons' will include corporations," and by the Code of Public General Laws of this State (1912), *Article 1, Section 14*, it is specially provided that the word *persons* shall include corporations unless such a construction of the statute would be unreasonable. To construe the word *persons* in the statute before us as including a municipal corporation, is not at all unreasonable and it should therefore be so construed.

The further contention is made by the petitioners that the City has not the right of jury trial when the appeal is taken by the land owner, even though it be held that the City has such right when the case is in Court upon its own appeal.

This contention is also based upon the above quoted language of the statute which is construed by the petitioners as giving the right of jury trial only to those taking the appeal.

As we have said the land owner or the City, or both, may, under the statute, appeal to the Baltimore City Court, from the award of the Commissioners for Opening Streets when dissatisfied with such award, and it is difficult to understand just why, or for what reason, this right is lost to the City, when it is brought into Court on appeal by the adverse party.

In this case the petitioners appeal because they are dissatisfied with the award. Their object in appealing is to

obtain a decision more favorable to them, and because the City is satisfied, and does not appeal, according to the contention of the appellants, it should be deprived of its right of jury trial, although the petitioners, as claimed by them, may exercise such right. The statute, we think should not be given this construction unless it is clearly shown by its language that such was the intention of the Legislature.

The statute has been amended several times, one of the last amendments being the one that gives to the Mayor and City Council the right of appeal accompanied by the right of trial by jury, clearly expressed, in cases where the appeal is taken by the City, and it is in connection with this amendment that we must consider the meaning of the words above quoted relating to the question as to whom the right of jury trial is given; and after a careful examination and consideration of the whole statute, as amended, we are of the opinion that the construction placed upon it by the petitioners is not in accord with the legislative intent and meaning of the statute. Its meaning is, we think, that in the event of the "persons"—those to whom the right of appeal is given—"appealing as aforesaid," the right of jury trial shall be secured, not alone to the party taking the appeal, but to all persons to whom the right of appeal is given, including the Mayor and City Council. The argument was made by the petitioners that the provisions in the statute, "that persons appealing shall be secured in the right of trial by jury," presupposed an existing right and that these were not "apt words to create a new right" and that by such provision no rights were created, but only existing rights secured thereby.

The claim was made that the right of trial by jury in these cases accrued to the land owners, and only to them, from the aforesaid Section 40 of Article 3 of the present Constitution, and that it was only to secure this right that the aforesaid words, of the statute \* \* \*, were inserted therein; but this argument loses whatever force or weight it might otherwise have, when it is disclosed that practically

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the same words are found in the Acts of 1838, Chapter 226, at which time the Constitution of this State then in force,—the Constitution of 1776—contained no such provision, and therefore the land owner's right of trial by jury at such time was created and conferred upon him by the statute and was not a pre-existing constitutional right, secured to him by such statute. This provision appeared for the first time in the Constitution of 1851 (Article 3, Section 46), and was thereafter inserted in the succeeding Constitutions of 1864 (Article 3, Section 39) and 1867.

In the course of the trial exceptions were taken to rulings of the Court relating to the admission of evidence and also to its rulings upon the prayers.

The Court granted the first, second, third, sixth, seventh, tenth and eleventh prayers of the petitioners and rejected their fifth, ninth, twelfth, thirteenth, fourteenth and fifteenth prayers; and of the City's prayers, it granted the ninth as offered and the fifth as modified. The petitioners excepted to the action of the Court in rejecting their said fifth, ninth, twelfth, thirteenth and fourteenth prayers, and in granting the City's fifth prayer and excepted, both generally and specially, to the granting of the 9th prayer of the City.

The City's ninth prayer instructed the jury that "when the City acquires title to land for the purposes of a street, in pursuance of an ordinance passed for that purpose, there is an obligation upon the City to complete the said street so that it may be used by the public as a street and that this obligation may be enforced by the abutting property owner from whom the land has been taken for such street, unless the said ordinance be repealed, and that, if the said ordinance be repealed, or if the City shall delay the construction of the said street, without legal justification, the abutting property owner from whom land has been taken for a street may have an action of damages against the City, if he shall have sustained damages through such repeal or such delay."

This instruction submits to the jury mere abstract questions of law, the correctness of which need not be inquired into.

The jury was called upon to ascertain the damages to be awarded and the benefits to be assessed to the petitioners.

The questions of law submitted by this instruction were not applied to the evidence in the case, nor had they any bearing or relation to the issues that were to be determined by the jury, and in no proper way could they have aided it in deciding such questions. Whether there is an obligation upon the City, in cases like the one before us, to complete the street to be used as such by the public, that may be enforced by the abutting property owners, if the ordinance is not repealed, and whether, in the event of a repeal of said ordinance or of delay in "the construction of the street, without legal justification, the abutting property owner from whom land has been taken for a street may have an action for damages against the City, if he shall have sustained damages through such repeal or such delay," are not ques-

The petitioners' ninth, thirteenth and fourteenth prayers tions that should have been submitted to the jury. These questions should not have been injected into the case.

The objection of the petitioners to the City's fifth prayer granted as modified appears to have been abandoned. also contain statements, and propositions of law that had, we think, no proper bearing or relation to the issues that were to be determined by the jury, and were in our opinion likely to mislead and confuse it, and therefore they should not have been granted. The Court likewise committed no error in its refusal to grant the petitioners' twelfth prayer. The fifteenth prayer, of the petitioners, offered upon the granting of the City's ninth prayer—which we have said was improperly granted—was also properly refused.

The law of the case in respect to the method of ascertaining the benefits to which the petitioners are entitled, as presented by the petitioners' seventh prayer, is certainly most

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favorable to the petitioners, and the granting of their fifth prayer—if it properly states the law—would have added nothing thereto that in any way could have benefited the petitioners or would have assisted the jury in reaching its conclusion, and consequently the petitioners were not injured by the Court's refusal to grant it.

The second, third, fourth, tenth and eleventh exceptions relate to the admission of testimony by which the value of the property of the petitioners was sought to be established by the amounts at which other lands, known to the witnesses had been sold.

It is the settled law, in this State and elsewhere, that in establishing the value of land, the prices realized at the sales of similar lands in the vicinity, made within a reasonable period of time theretofore, being voluntary and not forced sales, are admissible in evidence, either on direct or cross examination of witnesses conversant with the facts. *Mayor and City Council of Baltimore v. Smith*, 80 Md. 472-473, and other cases there cited.

In regard to the degree of similarity which must exist and the nearness in respect of time and place no general rules are laid down, and as the trial judge is usually conversant with such matters they must be left largely to his discretion.

Applying the law as we have stated it to the aforesaid exceptions, we find no error in the ruling of the Court in admitting such testimony, although in some of the exceptions, especially the third and fourth, the essentials stated above are not shown to exist in any marked degree, and in such instances the evidence given should have had little weight with the jury in establishing the value of the property, yet with the large discretion given to the trial judge we are unable to say that he erred in reaching his conclusion.

The Court we think erred in its ruling upon the fifth exception in admitting evidence of the possibility of a car line upon Twenty-fifth Street when opened and in allowing the witness to state how he would proceed to obtain such car

line if the property of the petitioners was owned by him. The possibility of a car line upon said street was altogether too speculative to be admitted in evidence effecting the issues before the jury, and we can not conceive how such statement of the witness could have reflected upon the issues.

The evidence admitted under the sixth exception was in our opinion properly admitted, and we find no error in the action of the Court in admitting the evidence mentioned in the seventh and eighth exceptions, or in its rulings upon the ninth, twelfth, thirteenth and fourteenth exceptions.

The sixteenth exception is to the ruling of the Court upon a motion for a new trial and to set aside the inquisition.

The grounds upon which the motion is made are those usually stated in a motion for a new trial, and it is in fact nothing more than a motion for a new trial, and it is so regarded by the counsel for the petitioners, in their written brief, and as there is nothing to distinguish such motion from like motion in other cases, we must hold to the well-settled law of this State that no appeal lies to this Court from the action of the lower Court in refusing to grant said motion. *Poe's Practice*, section 349, and cases there cited.

Because of the errors above mentioned, the judgment in this case will be reversed.

*Judgment reversed and new trial awarded.  
with costs to the appellants.*

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Syllabus

THE POSTAL TELEGRAPH CABLE CO.

*vs.*

THE STATE ROADS COMMISSION.

*Post roads: State bridges; telegraph companies; rentals for exclusive use. Landlord and tenant: money for occupation.*

*Appeals: second, in same cause; practice.*

*Pleadings: errors in—; waiver.*

Where a case, both in the lower court, and on appeal, was decided entirely upon questions presented by a demurrer to the declaration, the Court of Appeals, in a subsequent suit, between the same parties, and growing out of the same cause of action, may determine other questions not connected with the demurrer, without reviewing its former decision. p. 246

Ordinarily, as between persons in the relation of landlord and tenant, the regular payment by the one, and the acceptance by the other, of money for an occupation implies some kind of tenancy. p. 248

When the State is entitled to money for the use and occupation of public roads, it is proper for the suit therefor to be brought by the State Roads Commission. p. 249

The Act of Congress empowering telegraph companies to use post roads does not give telegraph companies the right to make special use of a States' property in its roads, etc., without compensation. p. 251

A telegraph company for a number of years had been making a special use of a certain bridge, owned by a private corporation, and had been paying to the said corporation a certain annual sum therefor, how arrived at or under what arrangement was not shown; the State Roads Commission acquired the bridge from the corporation, with all its interests and rights therein, to be used as part of the State Roads System; in a suit by the State Roads Commission against the telegraph company for the use of the bridge, it was: *Held*, that the State was enti-

tled to receive compensation for the special use; and that the former sum paid by the telegraph company might be considered as evidence of what was the value of such special use. p. 255

An agreement between counsel to waive all errors of pleading precludes the question as to whether the form of action itself was technically correct. p. 254

*Decided December 16th, 1915.*

Appeal from the Superior Court of Baltimore City.  
(DUFFY, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Walter H. Buck* (with whom was *Watson E. Sherwood* on the brief), for the appellant.

*Leon E. Greenbaum*, for the appellee.

BOYD, C. J., delivered the opinion of the Court.

This is the second time this case has been before this Court. In *State Roads Commission v. Postal Tel. Co.*, 123 Md. 73, the judgment which had been entered for the Telegraph Company, after a demurrer to the declaration had been sustained, was reversed and a new trial awarded. After the case was remanded, the defendant, the present appellant, filed five pleas. There was joinder of issue on the first and second (which were the general issue pleas), and the third, fourth and fifth were demurred to. The demurrer having been sustained, the defendant filed three amended pleas, which were also demurred to, and the demurrer was sustained to each of them. An agreement was entered into between the attorneys which recited that the defendant de-

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clined to further amend, and it was agreed "That the general issue pleas filed heretofore be stricken out and that all errors of pleading, if any, with respect to the said three special amended pleas as amounting to the general issue plea, and all other technical errors of pleading be and they are hereby waived." Judgment by default was entered and the damages were assessed by the Court at \$191.50. From the final judgment rendered this appeal was taken.

The declaration is set out in full in the opinion in the former appeal. By Chapter 116 of Laws of 1910, a number of new sections were added to Article 91 of the Code, enlarging the powers of the State Roads Commission, which was created by Chapter 141 of the Acts of 1908, and by Section 32P (now Section 48 of Article 91 of Bagby's Code) it was authorized to acquire and maintain the Conowingo Bridge across the Susquehanna River for the purpose of connecting the system of State Roads in Harford and Cecil Counties. The case as now presented may be thus stated: The State Roads Commission on August 22nd, 1911, purchased that bridge. For some years before the purchase the appellant had regularly paid the Conowingo Bridge Company \$95.75 every six months for the use thereof and continued to pay that sum up to July 1st, 1911. There is no allegation of an express contract or agreement in the *narr.* by which the appellant was to have the use of the bridge or was to make the semi-annual payments for any definite time, but it did in fact use the bridge and at least for the years 1906 to 1911, inclusive, made the semi-annual payments above spoken of for such use. No change has been made in the use of the bridge, but since the State Roads Commission purchased it the appellant has refused to pay anything, on the ground that it is now a free public bridge of the State and a portion and continuation of the State system of free public roads and highways, and it notified the State Roads Commission that after August 22nd, 1911, it would use it free from any demand or exaction of the plaintiff or any tolls or other charges

whatsoever. Whether that notice was before or after the purchase is not clearly stated in the pleas. In the second plea it is alleged that the company had accepted and was entitled to the benefit of the Post Roads Acts of Congress; that the roads leading to each end of the bridge were post roads, and that the defendant had maintained its structures over said roads to either end of the bridge prior to August 22nd, 1911, without payment of charges of any kind therefor; that immediately after the acquisition of the bridge by the plaintiff it became a public bridge of the State of Maryland, and as such a portion and continuation of the public roads of the State and of the Post Roads of the United States, and the defendant became entitled to construct, maintain and operate its lines of telegraph and to erect the necessary fixtures for sustaining the cords or wires of said lines over, upon and along said bridge. It also relies on the Act of 1868, Chapter 471, Section 129, which is now Section 359 of Article 23 of the Code. The plea admits the payment of the \$95.75 every six months, but alleges that there was no express agreement or known understanding between the Bridge Company and the Telegraph Company.

It is contended by the Telegraph Company that the pleas present defenses which were not passed upon in the former case and which it claims preclude recovery. There can be no doubt that any question not presented by the demurrer to the declaration, which was all that was before the Court on the prior appeal, can now be considered by us without requiring us to review our former decision. It would oftentimes save the time of the courts as well as a useless expenditure of money by litigants, if some method of procedure could be adopted by which all defenses could be required to be presented in the first instance, except in very unusual cases. but we have not yet reached the millenium in legal procedure. The brief filed in the other case by the present appellant began by stating that "for some years prior to the institution of this suit had an agreement with the Conowingo

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Bridge Company, a private corporation, under which the appellee used the bridge across the Susquehanna River, connecting Harford and Cecil Counties, for the purpose of carrying its wires used in its said business of a Telegraph Company across the said river." But in the first amended plea (we will refer to the amended pleas as the first, second and third, although those which they amended were marked third, fourth and fifth), it is alleged that the wires were upon the bridge prior to August 22nd, 1911, "without any contract or express agreement with said Conowingo Bridge Company or known understanding of any kind other than as herein recited," and in the second "that said payments were exacted of and paid by said defendant without an express agreement or known understanding with said Bridge Company."

Just what is meant by the expression "known understanding," as used in the pleas, is not altogether clear, as the defendant would scarcely want to be understood as having no means of knowing why the sum of \$95.75 was paid every six months to the Bridge Company, or how that sum was fixed, but the first plea does state that the defendant's wires, eleven in number, as stated in the plea, or twelve, as stated in an agreement of attorneys in the record, are strung above and along said bridge, and alleges that they, together with the necessary fixtures for sustaining them, are so removed from the traveled parts of the bridge as in no wise to interfere with the public use thereof. In a later part of the plea it is said: "That the consideration moving from said company to defendant for the payments made by defendant to it as aforesaid was the right to defendant to use said bridge structure for its corporate purposes free of any right of interference therewith by the State of Maryland or other parties, public or private," and it is then alleged that by such transfer to the plaintiff of said bridge the plaintiff's right to demand or collect from the defendant charges of any kind became limited to such charges, if any, by the Bridge Company as were due and owing by defendant to it on August 22nd,

1911, and that said grant did not give plaintiff the right to collect from defendant any other charges.

It must be admitted that when the case was formerly before us, we were led to believe by what the declaration alleged and by what the Telegraph Company said in its brief, that the arrangement between that Company and the Bridge Company was more definite than what is stated in the pleas. The declaration did not, however, allege that there was a contract or lease for a definite term, or that there was anything more than some arrangement between them by which the Telegraph Company, at the time of the purchase by the Commission and for a long number of years prior thereto, was and had been using the bridge with the consent of the Bridge Company, and that the Telegraph Company had been paying the Bridge Company "rentals and income for the use thereof, which said rentals and tolls had amounted from the year 1906 to 1911 to the sum of \$95.75 semi-annually in each year, for which amount bills were regularly sent by the Conowingo Bridge Company to the defendant and paid by the defendant up to and including the installment due on the first of July, 1911." If we apply the ordinary rules applicable to landlord and tenant, that was sufficient to imply some kind of a tenancy, for the Telegraph Company was in possession of and using the bridge with the permission and consent of the Bridge Company, and was regularly paying at stated periods a fixed sum for such use. So if this case merely depended upon establishing that relation between those companies we could have no difficulty.

The question, however, is whether under the conditions set out in the pleas the appellees can recover. We do not regard it as an open question whether the appellees can recover if the State could. We said in *State Roads Commission v. Postal Tel. Co.*, 123 Md. 73, that: "The suit was instituted in the names of the members constituting the Board of the State Roads Commission 'for and on behalf of the State of Maryland.' If then the State is entitled to money due for

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use of public roads, it was proper that the agency having charge and control of that department should bring suit in its behalf," etc. We will not, therefore, discuss that question, which was fully argued and considered on the prior appeal. The pleas do not present a different question in regard to that from what the demurrer to the declaration did.

So what we are now really called upon to determine is whether the State, if the suit had been brought in its name, could have recovered under the facts set out in the pleas. The case is a peculiar one in some respects, and at least some of the defenses set up by the appellant are wholly without merit. It is not easy to understand why a corporation, such as the appellant, should have been willing to pay and did pay for the use of a bridge, such as this, a definite and fixed compensation for a number of years, as long as the bridge belonged to a private corporation, but as soon as the State became the owner of the bridge by an expenditure of a large sum of money, should refuse to pay anything therefor, although its use of the bridge has not in any respect changed. If the Bridge Company were still the owner there could be no question about its right to recover, and in our judgment there can be no doubt about the right of the State to recover something in some kind of proceeding.

The case of *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, on which the decision of this Court in *Postal Tel. Co. v. Baltimore*, 79 Md. 502, was mainly based, and upon which the Supreme Court relied when it affirmed in 156 U. S. 210 the case in 79 Md., clearly sustains the right of the State to compensation and stated grounds upon which it can be recovered. After speaking of the use of streets of a city by the Telegraph Company and showing that its use is different in kind and extent from that enjoyed by the general public, the Court, in speaking of a ruling below that the charge was a privilege or license tax, said: "To determine this question, we must refer to the language of the ordinance itself, and

by that we find that the charge is imposed for the privilege of using the streets, alleys and public places, and is graduated by the amount of such use. Clearly, this is no privilege or license tax. The amount to be paid is not graduated by the amount of the business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the city—that which may properly be called rental. ‘A tax is a demand of sovereignty; a toll is a demand of proprietorship.’” The Court also said: “Now, when there is this permanent and exclusive appropriation of a part of the highway, is there in the nature of things anything to inhibit the public from exacting rental for the space thus occupied? Obviously not. Suppose a municipality permits one to occupy space in a public park, for the erection of a booth in which to sell fruit and other articles; who would question the right of the city to charge for the use of the ground thus occupied, or call such charge a tax, or anything else except rental? So, in like manner, while permission to a Telegraph Company to occupy the streets is not technically a lease, and does not in terms create the relation of landlord and tenant, yet it is the giving of the exclusive use of real estate, for which the giver has a right to exact compensation, which is in the nature of rental.” This Court in 79 Maryland quoted from that opinion where the Supreme Court, in speaking of the public streets, said: “While for purposes of travel and common use they are open to the citizens of every State alike, and no State can by its legislation deprive the citizens of another State of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another State, or a corporation of the national government, it is within the competency of the State, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation. It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads.

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telegraphs or telephones, the State may if it chooses, exact from the party or corporation given such exclusive use, pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated." In the late case of *Western Union Tel. Co. v. Richmond*, 224 U. S. 160, JUSTICE HOLMES said: "The inability of the State to prohibit the appellant from getting a foothold within its territory, both because of the statute (referring to the Post Roads Act of Congress) and of its carrying on of commerce among the States, gives the appellant no right to use the soil of the streets, even though post roads, as against private owners, or as against the city or State, where it owns the land." See also *Dillon on Municipal Corporations* or (5th Ed.), section 1220, where the question is discussed and many authorities cited.

It can not be doubted that this company has an exclusive use of a part of this bridge. It is true that according to an agreement of counsel filed in the case, the wires are carried on wooden cross-arms, which are attached to metal uprights bolted to the girders on top of the bridge, but the eleven or twelve wires are carried on them for a distance of 1336 feet, and although the agreement does not show the weight of the wires and the fixtures, it must be appreciable and they must require additional expense in the supervision of the bridge by the commission. Wires will break and sometimes are very dangerous to the traveling public, and it will be the duty of the commission or other representatives of the State to see that those using the bridge are protected from such danger. Then the necessary repairs and changes from time to time may make it more dangerous to those passing under them and will have a tendency to obstruct the bridge more than the ordinary use of it would. There are probably other special uses which might be mentioned, but however that may be, we can be assured that there must have been some good reason to induce the appellant to pay what it did pay to the Bridge Company year after year.

In *Beaver County v. C., D. & P. Tel. Co.*, 219 Pa. 340, 68 At. 846, the Telegraph Company had a contract with the Bridge Company under which it could place its telephone cables and wires, with necessary fixtures, on the bridge for the sum of \$50 a year and furnishing the Bridge Company with two telephones. During the term of the contract the county condemned the bridge and made it a public bridge. After that the Telegraph Company refused to remove its lines from the bridge or pay anything to the county for the privilege of maintaining them there. The county filed a bill in equity to require it either to remove its wires, cables and fixtures from the bridge, or pay a reasonable rental or compensation for its use and to enjoin it until such rental or compensation be fixed. The bill was dismissed, "without prejudice of the plaintiff to institute proceedings at law to recover damages to which the plaintiff may be entitled for the occupancy of the bridge." The Court said: "In the present case the Telegraph and Telephone Company laid its line upon the bridge under agreement with the corporation that was then the owner. It was rightfully upon the structure when it became a county bridge. We agree with the view taken by the trial judge that as matters now stand, in case the defendant company refuses to pay a proper rental, the remedy is not in equity to enforce the removal of its lines of wire, cables and attachments, which were lawfully placed upon the bridge, but it is in the right of the plaintiff to bring an action at law to recover the damages for the use of the bridge during the time for which no compensation has been paid. We can see no difference in principle between the use made of the bridge by a street railway company and that which is appropriated by the Telephone Company. Its wires, cables and appliances are carried upon, and supported by, the bridge structure, as long as its use is required." In *Beaver County v. B. V. Traction Co.*, 229 Pa. 565, 79 At. 161, a trolley company was using three bridges which belonged to private corporations. The county condemned them and made them free. The exact arrangements

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with the Bridge Companies were not shown but it was agreed that when they were condemned the defendant was lawfully using them "under arrangements theretofore made with the Bridge Company." It was said, quoting for convenience, from the syllabus in the Atlantic Reporter, that "A trolley company operating its street cars over a county bridge enjoys a special use, different in kind and extent from that of the general public, for which the county may exact rent, including therein a reasonable proportion of the cost incurred for necessary repairs to the bridge," and also that "Where a county by condemnation obtained bridges used by a trolley company under agreement with the private owners, and the trolley company afterwards contracted with the county for use of the bridges at a certain rental for a term of years, and after expiration of such term continued to use the bridges, but refused to pay rental therefor, the county can recover for such use after termination of the contract period." See also *Point Bridge Co. v. P. & W. E. Ry. Co.*, 230 Pa. 289, 79 At. 567; *Point Bridge Co. v. P. Ry. Co.*, 240 Pa. 105, 87 At. 614; *Mon. Bridge Co. v. P. Ry. Co.*, 240 Pa. 121, 87 At. 619, where different phases of such questions are considered, but the right to some kind of compensation is sustained. It is said by the appellant that those decisions were in regard to intrastate companies, but there can be no difference in principle inasmuch as the Supreme Court of the United States has over and over again applied such principles to interstate companies.

Conceding that ordinarily a suit in assumpsit for use and occupation does not lie, unless the relation of landlord and tenant between the plaintiff and defendant be established, it is sufficient to say that this is not technically such a suit. As said in the case in 148 U. S., *supra*, the relation of landlord and tenant does not technically exist, but assuming that it is not strictly speaking rent, the cases sustain the right to recover compensation for such exclusive use of a portion of the highways, which may be said to be in the nature of a rental.

The appellant was not a trespasser in going upon the bridge, as it went with the consent of the then owner, and having that consent it was authorized by the laws of Maryland and the Acts of Congress to maintain its lines there. The remedy for the refusal to pay compensation against one who continues to occupy premises which he entered lawfully and then refuses to pay, is not as it is in ordinary cases to eject such party from the premises, and it may be conceded that the appellant can not be ejected from this bridge, but by reason of that very fact the State would have no remedy unless it can recover compensation in some shape for the use of the bridge. Whether or not this *narr.* is in such technical form as it ought to be to recover such compensation is not material, for, as we have seen, the parties have agreed that "all errors of pleading, if any, with respect to the said three special amended pleas, as amounting to the general issue plea, and all other technical errors of pleading, be and they are hereby waived,"—it being, as we understand, the desire of the parties to have the question whether the appellees can recover compensation definitely determined. We might add, however, that inasmuch as the appellant can not be treated as a trespasser, the appellees could not well be required to bring a technical action of trespass.

It will be seen by reference to the cases referred to that, while they may differ somewhat in the use of terms—calling it "rent," "rentals," "damages," etc., it is generally held that the State, county or municipality (if of course the county or municipality has had the authority given it by the State) is entitled to reasonable compensation for a special use of highways and public places, unless it is estopped by reason of the grant of some franchise or some contract which it can not impair or change, and no Court has been more emphatic in its approval of the doctrine than the Supreme Court of the United States, so long as the State has not interfered with the foreign corporations or the ones subject to Federal control in its proper use of the public highways of the State.

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We are, however, of the opinion that in the absence of some contractual relations shown to exist between the appellant and the appellees, the latter were not necessarily entitled to recover the same amount that the Telegraph Company had been paying the Bridge Company, although it was convincing evidence of what was reasonable compensation for the use of the bridge which is now precisely the same as it was before the purchase. As the Supreme Court said in *Western Union Tel. Co. v. Richmond*, *supra*: "After the appellant, as is found, has paid the charges without complaint for many years, it would require something more than a mere protest now to induce us to find it unreasonable." See also 148 U. S., *supra*. But in this case no question is presented to us as to the reasonableness of the sum claimed, as the appellant denied all liability. The judgment can not therefore be disturbed by reason of the amount recovered, as that is in no proper way before us; but we are of the opinion that the appellant can hereafter question the amount, if it be true as set out in the pleas that it was not holding under a lease or some definite contract or agreement which has not expired, although it may not be out of place to apply to this case the language of the Court in *Beaver County v. Telegraph Co.*, *supra*. It said: "There should be no more difficulty in agreeing upon a fair rental, now that the county is the owner of the bridge, than there was when it belonged to the Ohio River Bridge Company."

We have not thought it necessary to discuss the question whether the fact that the bridge was a part of a highway which was a post road, or that the appellant was an interstate Telegraph Company subject to and entitled to the benefit of the Post Roads Acts of Congress. Our own case of *Postal Tel. Co. v. Baltimore*, 79 Md. 502, and the Supreme Court decisions referred to in that case and by us above, as well as many others that might be cited, are conclusive of that question. There is no attempt to interfere with the use of the bridge by the appellant as it has been using it, but the

State, through the agency representing it, does ask and demand that it be at least fairly dealt with, and that compensation be paid it for the special use the defendant makes of the bridge. It can not be doubted, as said by JUDGE CONSTABLE in the opinion in 123 Md., that the State was required to pay the Bridge Company for the income it was deriving from the appellant for the use of the bridge.

Nor is what is now Section 359 of Article 23, being the Act of 1868, Chapter 471, Section 129, an obstacle to recovery. That Act was in force when the case in 79 Md. was decided, and regardless of whether it was intended to or did apply to foreign corporations, it simply provided that Telegraph Companies could construct their lines as therein stated "without their being deemed a public nuisance or subject to be abated by any private party." That certainly can not be construed to give the right to such a corporation to make special use of the State's property without compensation.

We gave the Chesapeake & Potomac Telephone Company and the American Telegraph & Telephone Company leave to file a brief in this case, but we did not intend thereby to decide their cases further than what we say in deciding the one before us, as the brief rather seems to indicate it was thought we would do. We were left very much in the dark as to what the arrangements between the Bridge Company and the Postal Telegraph Company were, and if there is further litigation it should be more definitely established, if possible, so as to show whether there was such contractual relations between them as passed to the appellees as assignees, but we have no information as to the circumstances under which the two other companies referred to acquired any rights they may have to the use of the public highways of the State, or what they are. We can not therefore attempt to pass on them.

It follows from what we have said that the judgment will be affirmed.

*Judgment affirmed, the appellant to pay the costs.*

Md.]

Syllabus.

WASHINGTON, BALTIMORE & ANNAPOLIS ELEC-  
TRIC RAILROAD COMPANY

vs.

SETH H. LINTHICUM ET AL.

—

SETH H. LINTHICUM ET AL.

vs.

WASHINGTON, BALTIMORE & ANNAPOLIS ELEC-  
TRIC RAILROAD COMPANY.

*Railroad crossings: contract to construct; breach; damages.*

A contract between the owner of a tract of land and an electric railway company provided that the latter should construct railway crossings along the right of way through the property; in a suit for damages for breach of that contract, it was: *Held*, that in such a suit it was proper to consider the adaptability of the land to development for suburban residences, and as evidence of such contemplated development it was: *Held*, that the number of crossings might be considered, as tending to show that they were not intended as farm crossings merely. p. 267

In such cases compensation is not to be estimated simply with reference to the value of the land to the owner, in the way in which he maintained it, but consideration should be given to its value in view of the uses to which it was reasonably capable of being put. p. 268

*Decided December 16th, 1915.*

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Cross appeals from the Circuit Court of Baltimore City.  
(DUFFY, J.)

The facts are stated in the opinion of the Court.

The two causes were argued together before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

*George Weems Williams* (with whom was *Frank Gosnell*, on the brief), for the Washington, Baltimore and Annapolis Electric Railroad Co.

*S. S. Field*, for Seth H. Linthicum, et al.

THOMAS, J., delivered the opinion of the Court.

The bill of complaint in this case was filed in the Circuit Court of Baltimore City by Seth Hance Linthicum, Wade Hampton Linthicum and M. Delmah Linthicum, his wife, against the Washington, Baltimore and Annapolis Electric Railroad Company for the specific performance of a covenant contained in a deed from the plaintiffs to the Washington, Baltimore and Annapolis Electric Railway Company, or for compensation to the plaintiffs for the loss and damage sustained or that they will sustain by reason of the failure of the defendant to perform said covenant. The bill was answered by the defendant, and about three hundred and fifty printed pages of evidence was offered in support of the respective contentions of the parties. The Court below refused to grant the relief sought and dismissed the plaintiffs' bill. On appeal that decree was reversed, and the case was remanded in order that the Chancellor might ascertain, from the evidence already taken, and such additional proof as the parties desired to offer, the compensation proper to be awarded to the plaintiffs for the loss they have suffered and

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Opinion of the Court.

will continue to suffer because of the non-performance of the covenant.

The appeal referred to is reported in 124 Md. 263, and the facts of the case are stated in the opinion delivered by JUDGE STOCKBRIDGE as follows: "The Baltimore and Annapolis Short Line Railroad, which will hereinafter be referred to for sake of convenience as 'The Short Line,' was prior to the 15th of March, 1907, operating an electric railroad between Baltimore and Annapolis, and its route in part was along and over a right of way which had been acquired from the plaintiffs, or their predecessors in title. In the year 1906 and early part of 1907, the construction of an electric railway between the cities of Baltimore and Washington and Annapolis was begun by a corporation which had been formed for that purpose, bearing the name of the Washington, Baltimore and Annapolis Electric Railway Company. The route to be followed by this road, as laid out by the engineers, involved a double crossing of the tracks of the Short Line, as they existed at that time. Negotiations were entered into between the W., B. & A. Ry. Co. and certain members of the Linthicum family which culminated in certain conveyances bearing date March 15th, 1907. The effect of these was to shift the location of the Short Line tracks a little to the south and east of the projected route of the W., B. & A. Ry. Co. over land which was acquired from the Linthicum family, thus enabling the W., B. & A. Ry. Co., to construct a route partly over the former right of way of the Short Line and certain additional land acquired from the Linthicums, so as to avoid a crossing of railway tracks by one road over the other. This arrangement was consummated by two deeds, one a conveyance from Laura E. Linthicum, W. Hampton, M. Delmah and Seth Hance Linthicum to the Terminal Real Estate Company, of the land for the right of way to be used and occupied by the Short Line under its relocation; and the other from the same grantors to the W., B. & A. Ry. Co. of the additional land needed by the cor-

poration for the construction of its railway; this deed was executed for an expressed consideration of \$1,450, and the performance of the covenants and conditions contained in the deed, the two most important of which related to crossings and the establishment of a platform station. The covenant with regard to the crossings was that the railroad company was 'to immediately construct and maintain three crossings of not less than 20 feet on the surface over its right of way and over the Baltimore and Annapolis Short Line Railway at the places indicated on the plat hereto attached and crossing said right of way on the property hereby conveyed and on the property conveyed by the parties of the first part to the Terminal Real Estate Company of Baltimore City by deed of even date herewith, with easy approaches thereto of not more than 4% grade and with a roadbed of not less than 20 feet wide in good condition.' In the deed of the same date from the same grantors to the Terminal Real Estate Company, the grantors reserved 'to themselves, their heirs and assigns over the described lot a private crossing 20 feet wide at the point shown upon said plat,' referring to the plat attached to the deed to the W., B. & A. Ry. Co. The rights, and of course restrictions upon those rights, so granted to the Terminal Real Estate Company passed by conveyance from it to the Short Line.

"The W., B. & A. Electric Ry. Co. became insolvent, and was directed to be sold under a decree of the Circuit Court of the U. S. for the District of Maryland. At this sale the property was purchased on behalf of a corporation bearing the name of the W., B. & A. Railroad Co., a corporation having practically the same executive officers as the insolvent railway Company, but with some changes of stockholders and bondholders from those of the railway company."

"By an agreement made between Wade Hampton and Seth Hance Linthicum and either the railway or railroad company, of the three crossings covenanted for in the deed of March 15th, 1907, two were consolidated to make one cross-

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## Opinion of the Court.

ing 40 feet in width, in place of two 20 feet each, and the third crossing has never been constructed by either the railway or railroad company. It is for the specific performance of the covenant in its relation to this third crossing that the present bill was filed, with the alternate prayer for an award of compensation should the Court refuse a decree for specific performance."

We said in the former appeal that the "purpose to be served by the installation of the crossing is the development, for suburban residences, of a tract of 58 acres belonging to the plaintiffs," and that the damages claimed in the case "were two-fold in their nature; namely, the damage alleged to have resulted to the plaintiffs between the time of the execution of the deed of March 15th, 1907, and the time of the institution of this proceeding; and, second, the permanent injury to the plaintiffs' property by reason of being deprived of the crossing." There was no evidence in the record from which the Court could ascertain the damages sustained by the plaintiffs prior to the institution of the suit, but in reference to the permanent injury the Court said: "With regard to the second element of damages, the estimates varied considerably, from \$650 to \$9,000—the plaintiffs themselves placing the damages at \$6,000, while their expert witnesses gave higher figures. The case presents practically the same elements as are involved in a condemnation case, namely, the determining upon conflicting evidence of what is fair and just compensation, and the important question is, how shall this determination be made?"

After the case was remanded, the lower Court, upon the evidence previously taken and the additional proof offered by the plaintiffs and the defendant, and after the Chancellor had viewed the property at the suggestion of counsel for the Railroad Company, awarded the plaintiffs the sum of \$6,000, and from its decree requiring the defendant to pay that sum to the plaintiffs, the defendant and the plaintiffs have brought these appeals.

The property which contains, as we have said, about sixty acres, is situated on the west side of the Railroad Company's right of way, in Anne Arundel County, between five and six miles from Baltimore City. The land rises to quite an elevation above the railroad, which runs north and south, and extends west to a road called Hammond's Ferry road. Wade H. and Seth H. Linthicums' houses or dwellings, with about three acres surrounding each of them, are located on that part of the land adjoining the company's right of way. South of the residence of Seth H. Linthicum, and about four hundred feet from the southern limits of the plaintiffs' property, there is a depression in the hill, and at that point the plaintiffs have opened a road called Maple road, from the railroad extending west to the Hammond's Ferry road. At the intersection of Maple road and the company's right of way, the company constructed the crossing forty feet in width, referred to by this Court in the former appeal, and erected a station, and the road crosses the tracks of the W., B. & A. Railroad and the Short Line Railroad to the State road running to Baltimore City, spoken of in the evidence as the Boulevard. The crossing in question in this case is six hundred feet north of the Maple road crossing and the station. At that point there is another depression in the land of the plaintiffs, and they intended to open another road through their land from that crossing extending west to the Hammond's Ferry road, with the view of dividing the land fronting on that road into building lots. The crossing would afford a direct outlet from those lots and the Wade H. Linthicum residence, across the tracks of the W., B. & A. and Short Line Railroads, and over the intervening land of the plaintiffs, to the Boulevard, on the opposite side of which is another suburban settlement known as Linthicum Heights.

The evidence adduced by the plaintiffs tending to show the damages they will sustain by reason of the defendant's failure to construct and maintain the crossing in question, is based upon the theory that the land is available for development for suburban residences.

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## Opinion of the Court.

Bruner R. Anderson, a member of the bar, who owns land in the neighborhood of the plaintiffs' property and has had some experience in developing property in Anne Arundel County, testified that if a road was extended from the crossing over the land of the plaintiffs to the west, twenty-five lots could be laid out fronting on the road, and that these lots would be worth with the road and crossing about four hundred dollars apiece, and that without the crossing they would be worth not more than two hundred dollars apiece, and that the house occupied by Wade Hampton Linthicum, and the three acres of land surrounding it, would be worth about one thousand dollars more with the crossing. In other words, that the damages the plaintiffs will sustain by reason of the failure of the defendant to construct the crossing will amount to \$6,000.

Thomas R. Bond, who has been in the real estate business and engaged in the development of suburban property for a number of years, testified that about fifty lots could be laid out on a road opened from the crossing over the land of the plaintiffs; that these lots would be worth one hundred dollars apiece less without the crossing, and that the house and three acres of land surrounding it occupied by Wade Hampton Linthicum would be worth eight thousand dollars with the crossing and about five thousand dollars without the crossing.

A. Robinson White, a real estate broker of Baltimore City, when asked to state what additional value would be given to the property of the plaintiffs if it had a convenient outlet over the railroads at the crossing in question, said: "I divide the lots not into building lots, but into acreage. taking say thirty acres which will front on this new proposed road. I think that today in the open market it would sell by the acre at \$150 per acre. I think with the new road to go through there and the right to go through it, it would sell for \$300 an acre. I think that the house on the corner of the proposed new road and the electric line which was worth \$5,200, would sell for that in the open market with

the road open and the right to go through it, and without the road it would be worth about \$2,600 or \$2,500—In other words, I think the property loses about \$7,100 for the loss of the road. If you could put the road there you would get \$7,100 more for the property than without it.” In reply to the question by the Court, “You mean you would get it if sold by the acre as farm land that much, is that what you mean? he replied, “That is exactly what I mean.”

Oscar L. Hatton, who stated that he was a member of the bar and was engaged in developing property on the Severn River, in Anne Arundel County, testified that he knew the property of the plaintiffs referred to in this case and that it was “beautifully adapted to development;” that about twenty-eight acres of the plaintiffs’ land would be benefited by the proposed crossing and road and that in his judgment the property would be worth about \$9,000 more with the crossing than it is without the crossing.

Seth H. Linthicum, one of the plaintiffs, testified that he was a member of the bar and had devoted a great deal of attention to real estate, and that about twenty-five acres of the plaintiffs’ land through which a road from the crossing in question would run is worth about two hundred dollars an acre without the crossing and from five to five hundred and fifty dollars an acre with the crossing, but as the plaintiffs and the railroad company were mutually interested in the development of the property and the Linthicum Heights property, the plaintiffs were loath to bring this suit and would have been willing to accept \$6,000 for the loss of the crossing.

J. Charles Linthicum, whose property is just north of the plaintiffs’ property, and who, with his brothers, owns Linthicum Heights on the opposite side of the two railroads, stated that he thought that Mr. Bond’s estimate of the loss the plaintiffs will sustain by reason of the failure of the defendant to construct the crossing was extremely moderate, and further testified as follows: “Q. What is your view about the house of Wade Hampton and the three acres around

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it? A. As far as Wade Hampton's house is concerned, if somebody would tell me that I had to live there and go the way that he now has to go to get to the house, I would not want it at any price. But I presume that would not perhaps be giving it a proper value. His land is certainly worth a thousand dollars an acre, those three acres. The house could not be put up—— (Mr. Williams): Do you mean to say the land is worth a thousand dollars an acre? (The Witness): Yes, the land is worth a thousand dollars an acre, if you had this way in there, without any trouble. It is a beautiful location. It looks right on down into Baltimore. You can see the entire Patapsco River and down around Fort McHenry and as far as Fort Carroll, right from his front yard. You can see the whole landscape laid out before you. It is one of the prettiest views around Baltimore, and is easily worth a thousand dollars an acre. The house could not well be built with the substantial foundation and the slate roof which it now has and all modern improvements for less than five thousand dollars. And when I speak of building houses I know whereof I speak, because I have built a great many of them personally and knew pretty much what houses cost. I do not believe you could find a purchaser for it without this roadway across the railroad. I do not believe anybody who did not have it would buy it if they had no better inlet than what it now has. Perhaps it might bring three or four thousand dollars to some fellow who is willing to climb over the railroad, or willing to come through a barn yard and into the back way by the chicken yard, and so on. But I do not believe you could sell it at any price. I am certain no one at this trial table or here in Court would have it at any price, with the present entrance. Mr. Bond's estimate of three thousand dollars is certainly very small. It certainly would not sell for five thousand dollars in its present shape."

Alfred D. Bernard, a real estate expert, who was called by the defendant, testified at length to the advisability of adopting a different plan than that proposed by the plaintiffs

for the development of their property, which would not involve the use of the proposed road or crossing. When asked if it was possible for him "to come at any figure, definite figure, in dollars and cents, approximately, as to what, if any, damage is done to" the property of the plaintiffs "by the omission of the crossing" mentioned in the deed, he replied: "I do not see how it is possible to estimate the damage in dollars and cents, but it is apparent that there is some damage, there is some damage, because the man is deprived of access to the county road at a point where it is absolutely necessary for him to have access."

John J. Hurst, another witness called by the defendant, suggested a different plan from that proposed by Mr. Bernard, and in his judgment if another outlet was provided for the property of Wade Hampton Linthicum at a probable cost of seven hundred dollars, there would be no necessity for or advantage gained by the crossing in question.

The result of the evidence upon the question of damages is that the defendant's witnesses advise a different plan of development than that proposed by the plaintiffs. Mr. Bernard, while admitting that the plaintiffs will be damaged by the loss of the crossing, says that he cannot estimate the amount of the damages, and Mr. Hurst thinks that the necessity for the crossing would be obviated by another outlet from Wade H. Linthicum's property, which would probably cost seven hundred dollars. On the other hand the plaintiffs' witnesses fix the damages at from six to nine thousand dollars, and the award of the Court is the lowest estimate given by any of the plaintiffs' witnesses. In view of that fact, and the further fact that the lower Court had the advantage of hearing the testimony and viewing the property, we would not be justified in disturbing his award unless it was clearly erroneous, or was based upon some element of damages that should not have been considered.

The Court below in its decree found that the plaintiffs' land was available for suburban residences, and that the value of the land for that purpose was diminished to the extent

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Opinion of the Court.

of \$6,000 by reason of the failure of the defendant to construct and maintain the crossing in question, and counsel for the Railroad Company, relying upon the rule that the damages that a party ought to receive for the breach of a contract should "be such as may fairly and reasonably be considered either as arising naturally, *i. e.*, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as a probable result of the breach of it," insist that damages on the development theory cannot be recovered as arising in the usual course of things, and that they are not such "as might reasonably be supposed to have been in the contemplation of the parties at the time of the making of the covenant, as a probable result of the breach of the same." The theory of the defendant in this contention is that the property of the plaintiffs at the date of the deed from the plaintiffs to the Railway Company was farm land, and that there is nothing in the record to show that either of the parties to said deed had reason to suppose that the land would be developed for suburban residences. In this view we cannot concur. The land extends about ten hundred and fifty feet along the right of way of the defendant, and the deed provides for three crossings within that distance. That fact, the other provisions of the deed and the circumstances under which the deed was executed clearly indicate that the crossings were not desired or intended to be used as farm crossings. We said in the opinion rendered in 124 Md. 263, that the case presented practically the same elements involved in a condemnation case, and in 15 *Cyc.* 724, it is said: "Compensation is not to be estimated simply with reference to the value of the land to the owner in the condition in which he has maintained it, but with reference to what its present value is in view of the uses to which it is reasonably capable of being put." On page 726 the same author says: "It may be shown that the ground is adapted to be cut up and used for city improvements. It is immaterial that the land is not

at the time built upon, that the owner has not filed a town plat, or that the land is used by the owner only for farming or dairy purposes."

In the case of *Callaway v. Hubner*, 99 Md. 529, JUDGE PEARCE, speaking for this Court, quotes the statement in *Matter of Furman Street*, 17 Wendell, 669, that the proper inquiry was "what is the value of the property for the most advantageous use to which it may be applied?"; the statement in *Young v. Harrison*, 17 Ga. 30: "its value was not to be restricted to its agricultural or productive capacities, but that *inquiry should be made* as to all purposes to which it could be applied having reference to existing and prospective wants of the community," and the statement in *Boon Co. v. Patterson*, 98 U. S. 408: "Exceptional circumstances will modify the most carefully guarded rule, but as a general thing, we should say that the compensation to the owner, is to be estimated by reference to the uses for which the property is suitable, having regard to existing business wants of the community, or such as may be reasonably expected in the immediate future. \* \* \* And that the adaptability of the land in question was a circumstance therefore which the owner had a right to insist upon as an element in estimating the value of his land," and then adds, "and if this was an element of value upon which the owner had a *right* to insist, it is equally an element which the trustees in the present case were *bound* in the exercise of due diligence and discretion, to take into consideration." In the case of *Brack v. M. & C. C. of Balto.*, 125 Md. 378, this Court, speaking through JUDGE URNER, said: "The rule is that the market value of the land is to be estimated with reference to the uses and purposes to which it is adapted, and any special features which may enhance its marketability may properly be considered."

Upon the evidence in the case, and the authorities we have cited, the Court below was fully justified in awarding compensation to the plaintiffs to take into consideration the

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## Opinion of the Court.

adaptability of their land to suburban residences. The fact that such adaptability is considered does not render the estimates of the value of the land too uncertain and speculative, and the damages the plaintiffs will sustain is not measured by the profits they may realize from the development of the land for suburban residences, but by the difference between the value of the land with the crossing in question and its value without the crossing, in view of the uses to which the land is adapted.

The Railroad Company also suggests that the crossing referred to in the deed to the Terminal Real Estate Company is a private crossing, and that the estimates of the witnesses rest upon the assumption that it was a public crossing. The crossing referred to was not a private crossing in the sense that it could only be used by the plaintiffs. On the contrary, under a proper construction of the deed it was clearly intended for the use and benefit of the plaintiffs and those claiming through them the land referred to in this case, and the testimony had reference to such use.

It follows from what has been said that the decree of the Court below must be affirmed.

*Decree affirmed, each party to pay one-half  
of the costs in this Court.*

ADELE HILGARTNER, ET AL.,

vs.

CHARLES E. HILGARTNER,

INDIVIDUALLY AND AS ONE OF THE TRUSTEES OF ANDREW  
HILGARTNER, DECEASED.

*Wills: construction; power to purchase part of estate; time for  
exercise; reasonable time.*

In construing wills, the general intent of the testator must  
prevail over a particular intent. p. 273

A testator's estate consisted mainly of the capital stock of the corporation, under the name of which he and a brother had been carrying on a profitable business; the will, after making careful provisions for the division of his estate between his wife and children, and the survivors, etc., and, to his executors the power to sell, reinvest, etc., gave to a brother an option to purchase the testator's stock in said corporation at its book-value, according to the last annual statement: *Held*, in view of all the facts of the case, the option was intended to be one to be exercised in a reasonable time, and that a reasonable time would be within a year from the grant of letters on the decedent's estate. p. 275

*Decided December 16th, 1915.*

Appeal from Circuit Court No. 2 of Baltimore City.  
(HEUISLER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE,  
BURKE, THOMAS, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Md.]

Opinion of the Court.

*George Whitelock* (with a brief by *Whitelock, Deming & Kemp*), for the appellants.

*Roland R. Marchant* (with whom were *Addison E. Mullikin* and *Henry H. Dinneen*, on the brief), for the appellee.

STOCKBRIDGE, J., delivered the opinion of the Court.

This case involves the construction of certain provisions of the will of the late Andrew Hilgartner. By its first clause he gave to his wife "all my household goods, furniture, silver ware, plate, books and pictures which I may have in my dwelling at the time of my death; also all my private horses, carriages and harness, together with the sum of one thousand dollars (\$1,000) in cash."

The second clause of the will then reads as follows:

"I give, devise and bequeath all the rest and residue of my estate, real, personal and mixed unto my wife, Adele Hilgartner, and my brother, Charles L. Hilgartner, to be held by them, in trust, to collect and receive the rents, issues and profits therefrom and after the payment of taxes and other necessary charges and expenses incident to the preservation thereof, to pay the net income from my estate to my wife, Adele Hilgartner, for and during the term of her natural life if she shall so long continue my widow; and upon the death or remarriage of my said wife, then shall my trustees or the survivor or successor of them divide the said rest and residue of my estate as the same may be then constituted, among my children then living, share and share alike, *per stirpes* and not *per capita*, the child or children of any deceased child standing *in loco parentis*; the interest of any child or descendant thereof, who, at the time thus fixed for the division of my estate by my trustees shall not have reached the age of twenty-one years, to continue in the trust created for their use and benefit, until said age has been reached, then to vest free and clear of this trust. The trust in all events to cease and end when my youngest living child shall be twenty-one years of age, at or after the death or remarriage of my wife."

The third clause makes provision, in case Mrs. Hilgartner shall renounce the will, with regard to the disposition of the property, which had been bequeathed by the second item of the will.

The fourth clause made provision for the devolution of his property in the event of the death of one or more of his children, and by the fifth clause he provides as follows:

“Item 5. It is my desire and wish and I so will that my brother, Charles L. Hilgartner, be permitted to purchase from my estate the shares and capital stock of the Hilgartner Marble Company, a body corporate, owned by me at the time of my death, and if he should desire to purchase the same I authorize, empower and direct my executors, pending the settlement of my personal estate, and thereafter my trustees to make such sale at and for the book value of the said shares of stock as the same (book value) appears from the last annual statement of the condition and affairs of the said Hilgartner Marble Company made next preceding my death. *It is not my intention that the powers elsewhere granted herein to my executors and trustees to sell or change securities or investments of my estate shall apply to the shares of stock of the Hilgartner Marble Co., and should my said brother not elect to buy the said stock after my death, I direct my said trustees to hold the same as a part of the corpus of my estate. By the term ‘book value,’ as herein used, is meant the value of the said stock as the same is represented by the items of valuation in the statement of the company which is customary to have made annually by an auditor.*”

Mr. Hilgartner died on the 21st of March, 1914, and his will was admitted to probate the April following. The date of the granting of the letters does not affirmatively appear in the record, but presumably it was on or about the same date as the admission of the will to probate.

Md.]

Opinion of the Court.

On the 12th of February, 1915, his executors passed their first administration account, by which twelve hundred and fifty shares of the capital stock of the Hilgartner Marble Co. were distributed to his trustees under the terms of Item 2 of the will. On the same day, February 12th, 1915, jurisdiction of the administration of the trust was assumed by the Circuit Court No. 2 of Baltimore City, and the question now presented is, whether, under the language of Item 5 of the will, the right of Charles L. Hilgartner to purchase the stock of his brother Andrew in the Hilgartner Marble Co. had already expired by lapse of time, or whether that right still exists and will continue to exist throughout the life or widowhood of the testator's wife, Adele Hilgartner.

The language of Item 5 does not specify the precise point of time at or within which the option or right of Charles L. Hilgartner to purchase the stock of his brother must be exercised, and the contention on behalf of Mrs. Hilgartner is that such being the case, it is a right to be exercised within a reasonable time, if effect is to be given to the general intent of the testator. On behalf of Charles L. Hilgartner the contention is that the general intent and chief concern of the testator was to give to his brother the right to purchase this stock, and that, therefore, it is a right which must continue as long as Mrs. Hilgartner lives.

There can be no question in this State but that the general intent of the testator will always prevail over a particular intent: *Abell v. Abell*, 75 Md. 57; *Robinson v. Bonaparte*, 102 Md. 71; *Gordon v. Smith*, 103 Md. 315; *Higgins v. Safe Deposit & Trust Co. of Baltimore*, ante, page 171, and authorities therein cited.

What was the general intent of Mr. Hilgartner as expressed in his will? Was it to provide for his family, or was it that his brother should have the right to purchase his stock in the Hilgartner Marble Company? Manifestly, it was the former; his wife and children were the sole persons primarily named in the will, to share in the distribution of

his property. Even in the event of the remarriage of Mrs. Hilgartner, by the first item of the will a specific provision had been made for her, which it was expressly declared should not be affected by remarriage. It is probably true, as argued on behalf of the appellee, that Mr. Hilgartner desired that his brother should not be fettered in the business which they had carried on together, under the corporate form of the Hilgartner Marble Co., by a sale of Andrew's interest to persons who might be inimical to him, and for this reason it was his desire that his brother should have the opportunity to acquire his interest, if he so desired. But it can never be said that a right so given constitutes a general intent, when the party thus given the opportunity does not share to the extent even of a dollar in the distribution of the testator's estate. There was no disposition upon the part of Andrew Hilgartner that his interest in the corporation should be disposed of to an inimical interest. This appears from the provision which is made for the holding of the stock in that corporation by his trustees, and in his eliminating it from that part of the corpus of the estate of which the trustees were authorized to change the investment.

The conclusion is, therefore, inevitable that the language of the testator must be held to require the exercise of the option within a reasonable time, no time having been mentioned.

There are other expressions in the will which tend in the same direction; such as the mode of the determination of the value of the stock, upon the basis of which the option is given. Also the language in Item 5, "should my said brother not elect to buy said stock *after my death*, I direct," etc. This seems to contemplate an exercise of the option shortly after the death of the testator. Pointing strongly in the same direction also is the authority given to the executors to sell. The executors could not have been required to pass an account in the estate of their testator within twelve months from the date of the grant of letters; Code, Article 93, Section 1.

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Opinion of the Court.

If the option was one not to be exercised for a considerable time, why or what occasion could there have been to confer such a power upon the executors?

What then is to be considered a reasonable time within which the option or election to purchase should be exercised? The language of the will confers the right to make the purchase either from the executors or trustees. Andrew Hilgartner must be presumed to have made his will with knowledge of the law governing questions of administration. The executors might, if they had seen fit, have passed their account and so closed the estate upon the expiration of six months from the time of the grant of letters, and notice to creditors. If they had done so they would, thereafter, have held the property in the capacity of trustees and not as executors; but they were not compelled to so render an account under twelve months from the grant of letters; there was thus a period of six months during which they might hold in one capacity or the other, and their holding at such time, whether as executors or trustees, the testator could not foresee. If it had been his purpose to restrict the exercise of the option to six months from the date of his death there could of course have been no occasion to include the trustees when conferring the power, and so if his purpose had been that it was not to be exercised until after the twelve months, there was no necessity of conferring it upon the executors. It therefore follows, since the power of sale was conferred equally upon his executors and trustees, that a reasonable time for the exercise of such option, was any time within the space of twelve months after the grant of letters testamentary upon his estate.

The valuation that the purchaser was to pay, was to be determined by the book value of the stock as it appeared from the last annual statement of the condition and affairs of the company prior to his death. That ascertainment of value could conceivably have been made at a time twelve months before the next statement would in the ordinary course of business, be made up. It is true the interval between the

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last preceding annual statement and his death might have been a much shorter time, but it could not have been a longer period, and this fact again suggests that it was his purpose to give a right of purchase at any time within a year from the time of his death.

In point of fact the first account of the executors was passed in February, 1915, or ten months after the death of Andrew Hilgartner and the grant of letters upon his estate; by the account so passed the option not having been exercised, the stock necessarily passed from the executors to the trustees, and for two months after it had so passed to the trustees the right of Charles L. Hilgartner to exercise the option given him must be recognized, but with the expiration of the twelve months the reasonable time must be held to have passed and the stock now in question to be now part of the corpus of the trust estate, in accordance with the terms of his will.

There was some discussion in the argument as to a clash of interests between Charles L. Hilgartner, individually, and Charles L. Hilgartner, as trustee. This is not a matter which the Court is required to discuss at this time. Suffice it to say, that it is entirely clear, not that such a clash has arisen, but that one might easily arise. And this fact could only operate to still further emphasize the correctness of the conclusion already reached.

The appellee in his brief, for the purpose of controverting the conclusion indicated above, propounds several questions, but a discussion of and an answer to these would now be purely academic, in view of the conclusion reached.

*Decree reversed and cause remanded, the costs to be paid by Charles L. Hilgartner.*

Md.]

Syllabus.

BLUTHENTHAL & BICKART, A CORPORATION,

*vs.*

THE MAY ADVERTISING CO., A CORPORATION.

*Practice: withdrawal of jurymen; discretion of court. Prayers: unsupported by evidence. Contracts: waivers.*

A person entering into a contract has a right to insist on its performance in all particulars, according to its meaning and spirit; but if he chooses to waive any terms introduced for his benefit, he may do so. p. 282

Prayers unsupported by any evidence in the case are properly refused. p. 283

A prayer concluding with the right of either party to recover must submit the whole case, and the conclusion reached upon the facts must be correct notwithstanding all other facts and circumstances in evidence. p. 284

Before the jury was sworn the court allowed a party to withdraw his peremptory challenge against a jurymen, who thereby became a qualified juror, and exercised his peremptory challenge against another juror, who had previously been accepted: *Held*, that the Court in so doing acted within its discretionary power, and as it did not appear from the record that there was any abuse of discretion, resulting in injury to the opposite party, its action constituted no ground for reversal. p. 285

It is not reversible error for a Court of its own motion to exclude a juror, even for insufficient cause, if an unobjectionable jury is afterwards obtained. p. 285

It is the function of the jury to pass on the weight and credibility of the testimony, and the duty of the Court to state the law applicable to it. p. 282

*Decided December 16th, 1915.*

Appeal from the Superior Court of Baltimore City.  
(SOPER, C. J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*J. Kemp Bartlett* (with whom were *Edgar Allan Poe*, *L. B. Keene Claggett* and *R. Howard Bland* on the brief), for the appellant.

*Israel B. Brodie* (with whom was *Philip Sachs* on the brief), for the appellee.

BURKE, J., delivered the opinion of the Court.

The May Advertising Company, the appellee on this record, is a New York corporation. As its name indicates, it is engaged in the advertising business, which it conducts by painting bulletin boards, erecting them along the lines of railroads, and by securing wall space and painting thereon such advertisements on signs as its customers may desire. Carl May is the president and Wilson C. Reed the vice-president of the company. The office of the company is in New York City, and it has a shop in Pittsburgh, Pa., where sketches are made, and the metal bulletin boards are painted. The appellant, Bluthenthal & Bickart, is a Maryland corporation, and is a blender of whiskies and gin, which it sells under its own trade marks or labels to the trade in a number of Southern States. Some of its brands of whiskey are known as Old Joe, Mobile Buck, "Rx" Malt, and Mark Rogers. Aaron Bluthenthal is president and Monroe L. Bickart secretary and treasurer of the company.

Md.]

## Opinion of the Court.

In the early part of the year 1912 the parties to this case entered into a written contract, the terms of which are found in three letters appearing in the record, under which the appellant employed the appellee to paint from sketches, approved by the appellant, a thousand or more square feet of wall space on locations to be selected by the appellee in certain towns and cities in the South. The contract provided that the work was to be done in a first-class and workmanlike manner, and that the appellant should pay, thirty days after the completion of the showing in each city, the sum of six cents per square foot for the actual number of square feet painted in each city. A list of the cities in which the painting was to be done, as well as the approximate wall space to be painted in each city, appears in the contract. The appellee claimed to have performed its work under the contract in seven of the cities mentioned therein, and demanded payment for the work done. Its claim amounted to \$4,632.91. This claim the appellant refused to pay. The appellee brought suit against it in the Superior Court of Baltimore City and recovered a judgment. This appeal was taken by the appellant, the defendant below, from that judgment. The suit was brought under the Speedy Judgment Act, and the declaration contained the common counts, and one special count, which set out the contract between the parties and alleged the completion of the contract in certain specified cities; the refusal of the defendant to pay for any of the work done; and that the defendant had directed the plaintiff not to proceed with the work in any of the other cities mentioned in the contract. At the trial the appellee confined its claim for work actually done in pursuance of the contract. It did not seek to recover for the act of the defendant in preventing, as alleged, the performance of the contract in other cities. The contract contained a number of provisions which are not involved in this controversy. The three provisions which are involved are these: (1) That the plaintiff was personally to select the locations, and to use its best judgment in so doing. (2) That the painting was to be done in a first-

class and workmanlike manner. (3) That the wall display should make a proper and satisfactory showing. These obligations were expressly assumed by the plaintiff, and in addition to these, the defendant claims that the plaintiff was under an obligation to do the work by its own men.

Apart from certain technical defenses, which were abandoned in this Court, the defenses relied on were, *first*, that in many instances in each city, the work was not done in a first-class and workmanlike manner; *secondly*, that in some instances the plaintiff did not personally select the locations; *thirdly*, that in many cases the locations selected were poor and the wall display was poor and the showing not satisfactory; and *fourthly*, that the painting was done in each city, not by the plaintiff's own men, but by local men employed by the plaintiff. This was admitted by the plaintiff, and the reason that local men were engaged to do the work was, as stated by Carl May, that he was able to secure better locations by making arrangements with local men, because they were able to give a better distribution for locations than he would be able to secure. On other questions of fact there was decided conflict in the testimony. That of the plaintiff tending to show that the work was done as required by the contract; that of the defendant that in many instances the locations were poor, the workmanship inferior and the showing unsatisfactory.

It is needless to discuss this conflict in the evidence, as all the material questions of fact were submitted to the jury under the instructions of the Court. It is important, however, in this connection to state that testimony was offered on behalf of the plaintiff to the effect that the defendant was informed prior to the beginning of the work of painting that local advertisers had been engaged to do the work, why this arrangement with local men had been made, and that that arrangement had been approved and assented to and acquiesced in by the defendant. The defendant never attempted to rescind the contract, but permitted the work to proceed

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## Opinion of the Court.

until all the work sued for in this case had been done. It then expressed its willingness, after having inspected the work, "to pay for the signs that have been approved as good and fair," and in its letter of September 3, 1912, to the plaintiff a number of signs are designated as good or fair.

During the course of the trial, seven exceptions were reserved by the defendant—one to the action of the Court in excluding a juror from the panel before he had been sworn; five to rulings on evidence, and one to the ruling on prayers submitted at the conclusion of the whole case.

The defendant contends that the Court committed reversible error in refusing its first and fourth prayers. The first prayer was treated as a demurrer to the evidence, and asked that the jury be instructed to find their verdict for the defendant. Conceding that it could so be treated in the form in which it was drawn, which, however, we do not decide, we are of opinion that it was properly refused. The defendant invokes in support of this prayer the doctrine announced and applied in *B. & O. R. R. Co. v. Brydon*, 65 Md. 198, and *Eastern Advertising Co. v. McGaw*, 89 Md. 72. In the first of these cases it was held that in a contract where the quality and acceptability of the coal were left to the approval of a third party, there could be no recovery, unless acceptance by such third party be shown, or unless it be shown that the coal delivered was rejected by him in bad faith or fraudulently. This rule has been frequently applied by this Court. In the second case, it was shown that the appellant, without the consent of the appellee, had sold its business of street car advertisement to another company, but the appellee refused to assent to the assignment of the contract to the purchaser. It was contended that upon the authority of these cases there could be no recovery; *first*, because the work was not satisfactory to the defendant; and *secondly*, because the work of painting the signs on the walls of houses had been done by local advertisers in the various cities, without the defendant's knowledge or consent.

It is sufficient to say in reply to these contentions, *first*, that the defendant did approve a great many of the signs and expressed its willingness to pay for them; and, *secondly*, that there is evidence that it consented that the painting of the signs should be done by local advertisers. In view of this evidence the Court was right in not withdrawing the case from the jury. It is the function of the jury to pass on the weight and credibility of the testimony, and it is the duty of the Court to state the law applicable to it. "If the plaintiff completed the work according to the terms of the agreement, it was entitled to recover the contract price. If, however, it was done imperfectly, or in any manner variant from the stipulations of the contract, and was accepted by the defendant, the plaintiff was entitled to recover what it was reasonably worth. There can be no question on this point since the decision of this Court in *Watchman v. Crook*, 5 G. & J. 239. We take the principle to be, that a person entering into a contract, has a right to insist on the performance of it in all particulars, according to its meaning and spirit; but that if he chooses to waive any of the terms introduced for his own benefit, he has the power to do so. If he contracts for an article of a particular quality or style of workmanship, and he elects to accept in lieu of it one of another kind, he discharges the other party from the obligation of furnishing an article which complies with the specifications of the contract, and he becomes bound by a new implied contract to pay for the article, which he has accepted, what it is reasonably worth. And so where there is a contract for work of a particular description, and he accepts work of another kind. But he is not obliged to accept anything else in place of that which he has contracted for; and if he does not waive his right, the other party to the contract cannot recover against him without performing all the stipulations on his part. The question then in the present case, supposing that the work has not been done according to the contract, is whether the defendant has accepted it. The law on the subject of accept-

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Opinion of the Court.

ing work done on the land or property of another, has sometimes been declared with great severity against parties doing such work in a manner not conformable to the contracts which they have made. But these harsh judgments go beyond the requirements of justice, and are much modified by the benign and equitable construction of contracts which prevails in this State." *Presbyterian Church v. Hoopes Co.*, 66 Md. 598; *Walsh v. Jenvey*, 85 Md. 244; *Orem v. Keelty*, 85 Md. 337; *Waggaman v. Nutt*, 88 Md. 265; *North Bros. v. Mallory*, 94 Md. 305.

It is true that the defendant denied that it consented that the work of painting should be done by sub-contractors, and insisted that it did not become aware that it had sub-let until the work was practically completed, but there is evidence from which the jury might have found both consent to and acquiescence in this method of doing the work.

By its fourth prayer the defendant asked the Court to instruct the jury, that if they should find from the evidence that the contract between the plaintiff and the defendant provided that the plaintiff should personally supervise and select the locations for the various signs to be painted by the plaintiff in the cities designated by the contract between the parties, for the purpose of advertising the gins and whiskies sold by the defendant, and cause the same to be painted by painters in their direct employment; and if they should further find from the evidence that the plaintiff did not personally supervise and select said locations for the signs, but on the contrary, left the painting, supervision and selection of said locations to other persons without the knowledge or consent of the defendant, then the plaintiff is not entitled to recover, and the verdict of the jury should be for the defendant.

This prayer was bad for a number of reasons. In the first place there is no evidence to support the hypothesis of the prayer that the plaintiff left the supervision and selection of locations, for the various signs to be painted under the contract, to other persons. There is no evidence in the case to

support this unqualified statement, and the Court was justified in refusing the prayer for this reason. Again, its reference to the painting of the signs by other persons "without the knowledge or consent of the defendant" did not correctly state the law applicable to the facts in evidence, and would have been calculated to mislead the jury. The jury may have concluded under this form of prayer that the defendant was not liable unless it had knowledge and consented to the subletting of the work before the work was actually begun, as Carl May testified it had. Notwithstanding it may have so found, if it further found—as it might well have done—that the defendant during the course of the work became aware of the contract made with local men for doing the painting and that they were actually doing the work and that it acquiesced and consented to this and approved a large part of the work, it would still be liable. A prayer concluding with the right to either party to recover must submit the whole case, and the conclusion reached upon the facts stated must be correct notwithstanding all other facts and circumstances in evidence, or as stated in *Corbett v. Wolford*, 84 Md. 426: "When it is stated in a prayer that the plaintiff is entitled to recover, provided the jury find certain enumerated facts, it has been uniformly held that the effect of the prayer is to withdraw from the jury all other facts than those mentioned. It was so declared in *Riffin v. Patapsco Insurance Company*, 7 Harris & Johnson, 280; and also in *Bosley v. Chesapeake Insurance Company*, 3 Gill & Johnson, 462; *Adams v. Capron*, 21 Md. 205; *Haines v. Pearce*, 41 Md. 234, and in every other case where the question has been raised. If the jury would be justified in drawing from the facts excluded from the prayer a conclusion different from that which the prayer requires them to find, it is a manifest corollary from the ruling just mentioned that it would be error to grant such a prayer. The cases just cited maintain this position."

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## Opinion of the Court.

The other exceptions will now be considered in the order in which they were reserved.

After the panel had been selected to try the case in conformity with section 13, Article 51 of the Code, and before any of the jurors had been sworn, the counsel for the plaintiff requested the Court to allow him to withdraw one of his strikes, and to exercise the same so as to exclude from the panel T. Marshall Duer, who had been designated as foreman of the jury. This request appears to have been made because counsel for the plaintiff noticed that Mr. Duer, after taking his seat in the jury box had nodded in recognition to Mr. Bland, one of the counsel for defendant. The record states that: "Over the objection of counsel for the defendant, the Court permitted this action, and thereupon counsel for the plaintiff withdrew his peremptory strike to Mr. Whitelock and exercised the strike in the case of Mr. Duer. As above stated, counsel for the defendant objected to this substitution upon the jury of Mr. Whitelock for Mr. Duer, but the Court overruled the objection. The Court, however, offered to counsel for the defendant the privilege of having the jury drawn strictly in accordance with the provisions of the Code, but counsel for the defendant declined this offer, stating that they desired merely to confine their objection and exception to the withdrawal of Mr. Duer and the substitution of Mr. Whitelock in the manner above stated. The substitution of Mr. Whitelock for Mr. Duer was then made and Mr. Hardwick was designated as the foreman and the jury sworn."

It does not appear that the defendant was injured by the action complained of, or that the jury which actually tried the case was not composed of competent and qualified jurors. The authorities support the proposition that it is not reversible error for the Court of its own motion to exclude a juror, even for insufficient cause, if an unobjectionable jury is afterwards obtained. In *Pittsburgh, etc., Ry. Co. v. Montgomery*, 152 Ind. 1, in discussing an objection such as that now under consideration, the Court said: "It is complained

under the motion for a new trial that the Circuit Court erred in excusing on its own motion the juror Overholser, who it is alleged was a competent juror, over appellant's objection. But it is not shown that the jury which was finally impaneled was not a fair and impartial jury. In such a case, the matter is very much in the discretion of the trial Court, and no error is committed where no injury results from the Court's action in excusing the juror: *De Pew v. Robinson*, 95 Ind. 109. It is not even claimed that any injury resulted therefrom." This question is examined and authorities collected in 12 *Ency. Pl. & Prac.* 381-384, where it is said: "In the absence of any showing to the contrary, it will be presumed that in excusing a juror the Court acted on correct principles, and that the excuse was sufficient to warrant its action. In any event, the exercise of its discretion will not be revised unless it is clearly apparent that it has been abused. \* \* \* That the Court may exercise its discretion in this respect after acceptance of a juror, before completion of the panel, or before the person selected has been sworn and charged with the case, is generally conceded." What the Court did was done in the exercise of its discretionary power, and as there was no abuse of its discretion resulting in injury to the defendant its action does not constitute a cause for reversal.

We find no merit in the second exception. The witness Carl May, was testifying as to how he had made selection of location in Dunellon, Ocala and St. Augustine. He stated that he did not go to these three cities; but Mr. Mott had a map, and as the witness knew the cities very well, he picked out the selections, and said to Mr. Mott: "Any location down town that is on an open street that will give a good showing will be satisfactory to me." The Court overruled a motion to strike out this instruction given to Mott. It is not perceived how the defendant could have been injured by this ruling, and as it was merely a statement of the method by which the witness made selections of locations in those cities, we can see no good reason for excluding it.

Md.]

Opinion of the Court.

The third exception was taken during the examination of Thomas L. Kaplin, a witness produced on the part of the plaintiff. There was evidence tending to show that Mr. McCormick was the defendant's representative in New Orleans, and that he had been delegated to pass upon the signs in that city. The witness stated that he went to New Orleans, having a letter of introduction from Mr. Bickart, the secretary and treasurer, to Mr. McCormick; that he saw McCormick and went over the matter of locations with him; that "in my conversation with him he informed me that the wall showing was satisfactory so far as he was concerned." A motion was made by the defendant to strike out the statement made by McCormick. The Court overruled the motion.

We are of opinion that sufficient evidence appears in the record of Mr. McCormick's agency and authority with respect to these signs to have authorized the Court, under the principles stated in *Rosenstock v. Tormey*, 32 Md. 182, and *Fifer v. Coal Co.*, 103 Md. 1, to admit the statement objected to. The other reasons urged in support of the motion are disposed of by what we have said in passing on the rulings upon the prayers.

It is not contended that there is any reversible error in the fourth, fifth and sixth exceptions.

After a careful consideration of the whole record we are of opinion that the case was fairly tried and submitted to the jury under proper instructions as to the law, and that the judgment entered in favor of the plaintiff in the lower Court should be affirmed.

*Judgment affirmed, the costs to be paid by  
the appellants.*

## CHARLES W. HOBBS

vs.

## JAMES T. PAYNE.

*Equity: appeals—; none from reasons assigned for decree.*

The reasons assigned for a decree are no part of the decree itself. p. 290

The appeals allowed in equity cases by section 26 of Article 5 of the Code, "from final decrees or orders in the nature of final decrees," does not authorize an appeal from a statement in the opinion of the court in signing a decree. p. 290

*Decided December 16th, 1915.*

Appeal from the Circuit Court for Caroline County. (In Equity.) (ADKINS, J.)

The facts are stated in the opinion of the Court.

The cause was submitted to BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Reuben Garey* and *Fred. R. Owens* filed a brief for the appellant.

*T. Alan Goldsborough* filed a brief for the appellee.

BURKE, J., delivered the opinion of the Court.

It appears from the record in this case that on the 25th of October, 1909, two judgments, aggregating one hundred and eighty dollars and costs, were entered by Thomas J. Daffin, a Justice of the Peace of Caroline County, against James T. Payne, at the suit of his father, James L. Payne, who has since died. These judgments were entered to the use of Charles W. Hobbs. An execution was issued upon the judgments, and the Sheriff of Caroline County, Alcenus E. Cooper, levied upon the property of the defendant, who there-

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## Opinion of the Court.

upon filed a bill, which was subsequently amended, praying that the collection of the judgments and executions issued thereon, might be enjoined and cancelled. After demurrers to the bill had been overruled, an answer was filed by Charles W. Hobbs, one of the defendants, and testimony was taken by the parties in open Court. In the view we take of the case a discussion of the allegations of the bill and of the testimony becomes unnecessary. The lower Court filed an opinion in which the averments of the bill, the evidence taken, and the law applicable to the facts were considered and discussed. It reached the conclusion that the bill should be dismissed, and its conclusion was given effect by an order in the following terms: "It is, therefore, adjudged, ordered and decreed by the Circuit Court for Caroline County, in Equity, that the bill filed in this case, be and the same is hereby dismissed with costs to the defendant."

It is stated in the bill that immediately upon the rendition of the judgments, the defendant in the case, James T. Payne, ordered an appeal to the Circuit Court for Caroline County, and the evidence shows that he did order an appeal within three or four days after the judgments were rendered. But the magistrate refused to send the papers up until the defendant in the judgments had filed bond. Before the hearing in the Court below the term of the Justice who rendered the judgments had expired, and his docket and papers were deposited with the Clerk of the Court. After stating that the Justice was in error in refusing to send up the papers until a bond was filed, the Court held that the proper remedy of the plaintiff in this case was to apply for a mandamus requiring him to do so. The opinion then states that:

"If the plaintiff desires to do so, he may still have the papers in these cases sent up by the clerk (to whom the dockets and papers of said justice were delivered on his retirement from office) on the appeals heretofore prayed. And the sale under said executions and the collection of said judgments may be stayed pending said appeals, by the filing of bonds in said cases."

The appeal before us was taken by Charles W. Hobbs, the assignee of the judgments and one of the defendants, not from the decree dismissing the bill, but from the portion of the opinion of the Court above quoted. In the order for appeal this portion of the opinion is designated as a portion of the decree.

We think it is clear that no appeal lies from this statement in the opinion of the Court. So far as the record shows, no application has been made to the Court to have the clerk send up the papers, and no order has been passed to stay the execution and collection of the judgments. What the Court might do if such applications were made we do not know and we have no right to anticipate. Under section 26, Article 5, an appeal is allowed "from any final decree, order in the nature of a final decree, passed by a Court of Equity, by any one or more of the persons parties to the suit." The only final order or decree in this case is that which dismissed the bill, and from that order no appeal has been taken. The *reasons* upon which the Court acted as expressed in its opinion are one thing,—the *thing decreed* is quite a different thing. It is stated in *Miller's Eq. Pro.* section 260, that: "The decree of a court of equity, and not its opinion, is the instrument through which it acts in granting relief. The opinion of the court does not constitute a part of the decree or of the record. It is the expression of the reasons by which the Judge reaches his conclusion. The decree, on the other hand, is the fiat or sentence of the law, determining the matter of the controversy. An opinion, however positive, is not in any sense a final act; it is not the subject of appeal, and may always be changed before final decree. The reasons assigned for a decree are no part of the decree itself." In the notes to this section a full collection of authorities are given in support of the text. The portion of the opinion from which this appeal was taken is not a part of the decree or order passed by the Court below, and for this reason is not appealable. It results from this conclusion that the appeal must be dismissed.

*Appeal dismissed, with costs.*

Md.]

Syllabus.

JAMES S. CALWELL, INDIVIDUALLY AND AS TRUSTEE,  
ET AL.,

vs.

AIMEE C. ROGERS.

*Gifts: terms of trust; acceptance; cestui que trust no right to  
alteration of terms.*

Where an aunt and the father united in a voluntary gift to the daughter, and had stock placed in the daughter's name, the income to be paid to the daughter but the stock delivered to the father, as trustee, to be held by him until his death, to all of which terms the daughter consented, there is no legal or equitable principle that enables the donee to abrogate the terms and limitations of the gift and receive the immediate delivery of the stock. p. 294

One who accepts a voluntary benefaction, with the understanding and agreement that it shall be subject to the terms of a trust expressly declared and approved, can not be permitted to deny the efficacy of the trust, or to defeat the purpose for which the limitations were imposed. p. 294

*Decided December 16th, 1915.*

Appeal from the Circuit Court No. 2 of Baltimore City.  
(HEUISLER, J.).

The facts are stated in the opinion of the Court.

## Opinion of the Court.

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The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

*Harry M. Benzinger* and *Henry H. Dinneen*, for the appellants.

*J. Pembroke Thom* and *J. Stanislaus Cook*, for the appellee.

URNER, J., delivered the opinion of the Court.

Upon the death intestate of Catherine M. Calwell in August, 1913, her estate passed to her brother and sister, James S. Calwell and Fannie C. Lambert, the present appellants, as her only next of kin and heirs at law. In pursuance of a request made by their deceased sister in her lifetime, that some provision be made for her niece, Annie C. Calwell, daughter of James S. Calwell, the appellants proposed to establish a fund of ten thousand dollars, of which each of them should contribute one-half, to be invested in Mr. Calwell's name as trustee, and the income to be paid by him to his daughter during his life, and after his death the *corpus* of the fund to be paid to her absolutely. It was concluded, however, upon further consideration, that it would be a simpler and better plan to have the stock, in which it was intended to invest the fund, issued in the name of the daughter, and to have the certificates of the stock delivered to her father as trustee and held by him until his death. This modified proposal was fully explained to the daughter and met with her approval. The fund of ten thousand dollars was accordingly provided by her father and aunt and was invested in Baltimore City and national bank stock, the certificates of which were issued in the daughter's name, but were delivered to her father and have since remained in his custody. The income from the investments has been received by the daughter as it accrued. Shortly before her marriage, in December,

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1914, she demanded the delivery to her of the certificates of stock held for her benefit, claiming that they were her absolute property. This demand was refused on the ground that it was inconsistent with the conditions upon which the fund was raised and invested, and that the trustee having charge of the certificates would not be justified in subjecting the *corpus* to the risk of loss and waste in the hands of the young and experienced beneficiary. After the marriage, the demand for the certificates being renewed and not complied with, the daughter employed counsel who formally advised Mr. Calwell in writing that he had been retained for the purpose of securing possession of the certificates for his client. The bill of complaint in this case was then filed by Mr. Calwell and his sister, containing allegations upon which the above statement of facts is based, and praying the Court to assume jurisdiction of the trust we have described, and to decree that according to its terms the beneficiary should only receive the income during her father's life and should not be entitled to the stock certificates until his death, and to further decree that the certificates be endorsed to a trustee to be appointed by the Court, and that the daughter, who was made defendant in the case, should be enjoined from instituting or prosecuting any action at law against the plaintiffs for the possession of the certificates pending the determination of the suit.

The case was heard in the Court below upon a demurrer to the bill of complaint. The demurrer was sustained and the bill dismissed by a decree which ruled that, in view of the allegations of the bill, the defendant was entitled to the entire estate in the certificates of stock and to their possession. We are unable to agree with this conclusion. It was probably based upon the theory that the trust was merely passive and should therefore be terminated at the request of the owner of the whole beneficial interest. In our opinion this principle is not applicable to the special state of facts admitted by the demurrer. This is not a case in which an inactive trust has been created by will in respect to property

devised or bequeathed. It is a case in which a living father, prompted by his parental solicitude, has reserved and desires to exercise, during his life, a right of control over the disposition of an estate which he and his co-settlor have provided for the benefit of his daughter. It is also a case in which it is alleged that the beneficiary of the trust, who was consulted in advance as to the provision designed to be made in her favor, and who assented to the conditions imposed as a protection against her inexperience, is attempting to convert a qualified into an absolute gift contrary to the trust limitations in which she concurred. As the donors' purpose was to safeguard the *corpus* of the fund against improvident disposition by the donee, it may be regarded as certain that they would have adhered to the original plan of creating a complete and active trust, if the donee had not agreed to the simpler method, actually adopted, of restraining the alienation of the estate during the father's lifetime. The gift having been accepted upon the distinct understanding that it should not be absolute during the life of the father, and that the stock certificates should be held by him until his death, we are aware of no legal or equitable principle which would enable the donee to abrogate the terms and limitations of the gift by demanding and securing the immediate delivery of the certificates. The considerations which determine the effect and operation of testamentary and other trusts, created under ordinary circumstances, do not apply to a case like the present, where both the settlors and the beneficiary participated in the declaration of the trust by agreeing in advance upon its terms. In that important respect the case now before us differs from all those cited in the argument. The question here is not whether the issuance of stock in the name of a proposed donee constitutes a complete and unconditional gift while the donor retains the stock certificates, nor whether the legal effect of a particular trust provision is to vest the entire estate in the *cestui que trust*, but the question is whether one who accepts a voluntary benefaction with the

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understanding and agreement that it shall be subject to the terms of a trust expressly declared and approved, can be permitted to deny the efficacy of the trust and to defeat the purpose for which its limitations were imposed. It seems clear to us that such an inquiry must be answered in the negative.

It does not follow, however, from the conclusion just stated that we should favor the granting of all the relief sought by the bill of complaint, in the event that its averments are duly proven. As the defendant was apparently taking steps to require the delivery of the stock certificates and to have the trust terminated, we think the bill is maintainable for the purposes of a decree declaring the trust and restraining the prosecution of any action by the defendant to secure possession of the certificates; but the appointment of a trustee by the Court, as prayed in the bill, is unnecessary, and the prayer that the defendant be compelled to endorse the certificates to a trustee thus appointed is not consistent with the terms of the trust.

*Decree reversed, with costs, and cause remanded.*

## BOARD OF CANVASSERS OF ELECTION

*vs.*

HART B. NOLL.

AND

HART B. NOLL

*vs.*

## BOARD OF CANVASSERS OF ELECTION.

*Election laws: tally sheets; discrepancies; duty and authority of Board of Canvassers; ballot boxes, condition of—.*

The Board of Canvassers have no power to reject the returns of an election precinct on the ground that the strip of paper required by Art. 33 of the Code to be pasted on the ballot box has been torn, broken and virtually destroyed. The ballot boxes used at an election are not part of the returns and are not before the Board of Canvassers, as such, and at the time of the canvass they should be in the custody of the Clerk of the Circuit Court for safekeeping. pp. 300-301

In case of a contest, the condition of the ballot boxes may become material and pertinent, but not at the canvass by that Board provided for by Article 33. p. 301

The ballot boxes of an election form no part of the election returns, referred to in sections 82 and 83 of Article 33 of the Code, and the Board of Canvassers, as such, have no right to have the ballot boxes before them. p. 300

While the conditions of the ballot boxes may be pertinent and material in an election contest, it can not present a question for the decision of the Board of Canvassers. p. 301

Where tally sheets, returned by the judges and clerks of an election, differ, the statute does not authorize or require the Board of Canvassers to decide or choose between them. p. 304

In such cases, if it clearly appears that mistakes have occurred in any of the statements or tallies made to the Board of

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Canvassers, it is their duty, under section 85 of Article 33, to subpoena the judges and clerks who made the returns, etc., who must appear and make such corrections as the facts of the case may require. pp. 306-307

One tally sheet of an election district had 275 marks for one candidate, named O'Malley (there being six instead of five marks in each of three blocks), and the other only had 272 marks for that candidate. The four judges and two clerks certified on both tally sheets, and in their written returns, that 272 votes were cast for O'Malley. *Held*: that the Board of Canvassers were not justified in counting 275 votes for O'Malley. pp. 307, 311

*Decided December 16th, 1915.*

Cross appeals from the Circuit Court for Howard County. (THOMAS, C. J., and FORSYTH, JR., J.)

The facts are stated in the opinion of the Court.

The appeals were argued together before BOYD, C. J., BRISCOE, BURKE, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Chas. C. Wallace* and *Isaac Lobe Straus* (with whom were *Arthur P. Gorman, Jr.*, and *D. C. Higginbotham*, on the brief), for Philip Smallwood *et al.*

*Henry W. Williams* and *William L. Marbury* (with whom were *James Clark* and *William L. Rawls* on the brief), for Hart B. Noll.

BOYD, C. J., delivered the opinion of the Court.

Hart B. Noll and John F. O'Malley were candidates for the office of Clerk of the Circuit Court for Howard County at the election held November 2, 1915. The Board of Canvassers rejected the returns of the First Precinct of the Second Election District of that county, which it is alleged showed a plurality of forty-five votes for Noll, and counted 275 votes for O'Malley, instead of 272 votes, in the Sixth Election District, which resulted in a plurality of forty-

seven votes for O'Malley over Noll, instead of a plurality of one for Noll over O'Malley, which it is claimed the returns showed on their face.

Noll filed a petition for a mandamus in the Circuit Court for Howard County, "To the end therefore that the said defendants may be ordered to reconvene and correct the errors made by them as above set forth," and asking for a rule against the members of the Board of Canvassers, to show cause why a mandamus should not be issued "to compel the said defendants to correct the errors complained of." An order was passed and the defendants answered. A demurrer was filed to the answer, and after a hearing the lower Court passed an order by which the demurrer was sustained; and it provided that:

"Upon the facts stated in the petition and admitted in the answer of the defendants, and the admission of counsel, it is further ordered that the writ of mandamus issue forthwith, commanding the defendants to convene as a Board of Canvassers and to issue a subpoena to the Judges and Clerks of Election of the Sixth Election District of Howard County, at the election held on the second of November, 1915, requiring them to attend before said Board of Canvassers and make such corrections in the returns from said Election District as the facts of the case require, such changes not to alter any decision 'before duly made by them,' and commanding the Board of Canvassers of Howard County, after such corrections in the returns from said Sixth Election District have been made as aforesaid, to canvass the votes for the Clerk of the Circuit Court for Howard County, in the First Precinct of the Second Election District of said County, as shown by the returns and tally sheets thereof delivered to said Board of Canvassers, and to add up said votes, together with the votes for the Clerk of the Circuit Court for Howard County in all other districts of said County, as shown by the returns and tally sheets of the election held on the second of November, 1915, in said county,

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and to make abstracts and statements of the same, and to transmit such last named statements, so to be made by the defendants as aforesaid, attested by the signature of their Chairman and Secretary, to the Clerk of the Circuit Court of said County."

Both sides appealed from the order so passed, and at their instance we advanced the case for hearing. The appeal of the petitioner Noll is based on the theory that the order of Court was not in accordance with the prayer of the petition and the admissions in the case—that the Court ought to have granted the prayer to require the defendants to correct the alleged error made by them in counting 275 votes, instead of only 272 votes for O'Malley in the Sixth Election District. The defendants contend that the demurrer ought to have been overruled and the petition dismissed, and that the order for a mandamus is not in accordance with the prayer of the petition. It is likewise contended that the determination of the canvassers in reference to the 275 votes was not subject to review by the Court and that O'Malley, having received 275 votes in the Sixth Election District, had a plurality of two votes over Noll, even if the alleged plurality of 45 votes, claimed in the petition to have been received by Noll in the First Precinct of the Second District, be allowed him, and hence a mandamus would be nugatory. Some other points are made, but we will first consider the two principal questions in the case, as their determination may relieve us of the necessity of discussing some which may be regarded as of more technical character. A contest over an election to this office must, of course, be made, if at all, before the House of Delegates, as provided by section 12, Article 4 of the Constitution, but that does not affect the power of the Court to require the Board of Canvassers to correct errors, if any, as provided for in section 86 of Article 33 of the Code.

The two main questions may be thus briefly stated: 1. Did the Board of Canvassers properly and legally reject the returns from the First Precinct of the Second Election Dis-

trict? 2. Did they have the right to count 275, instead of 272 votes for O'Malley in the Sixth District?

1. The canvassers say in their answer that they rejected the returns from that precinct, because when the "ballot box was delivered to and produced before these defendants, it was found that the seals required by law to be put upon the same were broken and destroyed, that the strips of paper containing the signatures of and authentication by the judges and required by law to be placed, pasted and sealed over the slits, keyholes, edge of the lid and other parts of the ballot box had been torn, broken and virtually destroyed, so that it was fully manifested that said ballot box had been seriously tampered with and its authentication and identity as the ballot box of said precinct in large measure destroyed."

Although the canvassers did reject and refuse to count the returns from that precinct, which the petition alleges had given Noll a plurality of 45 votes, and thereby did make it appear by the statements made by them under sections 82 and 83 of Article 33, that O'Malley had a plurality of 47 votes in the county (including the three votes to be considered below), it was not and could not be seriously urged in this Court that the canvassers had the right to reject those returns. Section 82 provides that, "The Board of Canvassers shall, upon being duly organized, open all the original statements or returns and tally sheets delivered or transmitted to them, and shall canvass and add up the votes and make abstracts or statements thereof in the following manner, as the case may require, namely," etc. This Court said in *Price v. Ashburn*, 122 Md. 514, that "It has been repeatedly held, that the duties of canvassing officers are purely ministerial and under the facts of this case, the canvassers could only canvass and declare the result as shown by the returns."

Regardless of all other matters, the plain and conclusive answer to any contention that they could reject the returns of a district or precinct for such reason as is given in the answer is that the ballot boxes are not before them as canvassers. They are in no sense a part of the returns before

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them. We have shown above what they have before them, and by section 77 the judges of election in the counties are required to deliver to the proper officers the ballot boxes, keys, etc., before 12 o'clock noon of the second day after the election, and by section 78, it is provided that "The Board of Supervisors of Elections, upon receiving a ballot box and the key thereof, shall note the condition of the seal or stamp on each box, and make an entry of the facts touching the same in a book to be kept by them, together with the name of the officer who delivered the box. They shall deliver all the ballot boxes so sealed as aforesaid to the clerks of the Circuit Court for their respective counties \* \* \* who shall put them in a secure place to which the public shall in no case have access," etc. The Board of Canvassers, as such, have no right to have them before them, as they should then be in the custody of the clerk for safe keeping. In the answer it is not even alleged that the Board of Supervisors of Elections had noted any unusual condition about this box, but if they had so noted, the condition of the ballot boxes was, under the statute, of no more concern to the canvassers while acting in that capacity, than was the condition of any election booth which might be returned. In case of a contest the condition of the former often becomes material and pertinent, but not at the canvass by that board.

The powers conferred on the Board of Canvassers are wholly different from those conferred on the same individuals when acting as Supervisors of Elections. It is not easy to understand how the canvassers could have gone so far wrong, as to suppose they had the power to reject those returns by reason of the condition of the ballot box. It is too clear to require further discussion that they had no such power, and they should be counted.

2. But after counting the votes in that precinct, O'Malley would still have a plurality of two over Noll, and an important question, therefore, is whether the canvassers were right in counting 275 votes for him in the Sixth District. It is not denied that one tally sheet and the returns of the

four judges and two clerks for that district showed that O'Malley received only 272 votes, but in three blocks of the other tally sheet, there were six marks instead of five. Those three marks were not counted by the clerks of election, but were by the canvassers—hence the 275 votes, instead of 272. The petition alleges:

“That said three votes so erroneously counted for said O'Malley by the said defendants were so counted by the defendants, or rather by two of said defendants, to wit, Philip S. W. Smallwood and Mathew A. Powers, the defendant, Walter S. Black, not concurring therein, upon the plea or pretense that three of the blocks upon one of the tally sheets of said 6th Election District did contain six pencil marks instead of five, although said three blocks were in each case tallied by the clerk of election as containing five marks each, and the total of said tally sheet as noted thereupon by the clerk of election showed only two hundred and seventy-two votes to have been cast for said O'Malley, as did also the remaining tally sheet and the statements of the results executed and returned according to law.”

The answer alleges:

“They respectfully show that the tally kept and made by one of the clerks of said Sixth Election District of the votes cast at said election in said district as required by law and the tally sheet made out by him containing said tally so made and kept by him, and which said tally sheet was returned to the Board of Canvassers as required by law for the purpose of canvassing the votes cast in said district at said election, contained clearly and distinctly and in the judgment of a majority of the Board of Canvassers, beyond the possibility of dispute, 275 tally lines or marks recorded as and representing votes cast at said election in said Sixth District for said O'Malley for said office of Clerk, and that accordingly, the said majority of the Board of Canvassers being convinced that said tally sheet correctly represented and set forth the results

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of the election in said district, counted for said O'Malley the number of votes, namely, 275 votes, which appeared thereupon for said O'Malley. \* \* \* That these defendants had to choose between the tally sheet aforesaid which showed that O'Malley had received 275 votes and the other tally sheet from said election district which showed that said O'Malley had received 272 votes; \* \* \* and that in the exercise of their duties and powers, imposed upon them by law, being bound and required to determine which of the two tally sheets truly set forth the correct number of votes received by said O'Malley in said Sixth District in said election, they deemed it right and proper to give effect to the tally sheet, aforesaid, which contained 275 strokes or marks for him, not only because said tally sheet from its appearance commended itself to them as preferable, but because it contained clear, positive, original and contemporaneous entries or records of 275 votes actually cast for said O'Malley and set down upon said tally sheet by the clerk in the discharge of his duties respecting the same, whilst the ballots were being inspected, the results of the marks made by the voters upon them being announced, and the count of the votes and the making of the tallies recording the same going on."

It is impossible to find in the answer any satisfactory reason for the two canvassers adopting 275 as the correct number of votes cast for O'Malley, when the other tally sheet only had 272 "tally lines or marks," as the answer calls them, and the four judges and two clerks certified on *both tally sheets* and in the statements or written returns that 272 votes were cast for O'Malley. If it were true that they "had to choose between" the two tally sheets, as their answer alleges, no good reason is disclosed for selecting the one with 275 marks which had no extrinsic support for the three additional marks, rather than the one with 272, which was confirmed by the certificates of the six election officers, and it is not claimed or suggested that the one with 272 marks did

not contain "clear, positive, original and contemporaneous entries or records" of votes actually cast and "set down upon said tally sheet by the clerk," etc., just as the answer speaks of the other one. Indeed, it is not pretended that they differ in any respect, excepting as to the number of marks, and, as we have seen, the number on the one corresponds with the certificate of the election officials, while the other does not.

There is not the slightest justification in the statute for pursuing such a course. They were not only *not required* to choose between the two tally sheets, but they had no authority to add three votes to those returned by the judges and clerks, merely because they found three more marks on the one tally sheet. If that were permitted, then a dishonest clerk of election might add some marks in his tallies without it being observed by others, agree with the other clerk as to the correct number, so as to throw him and others present off their guard, and then have them brought to the attention of the canvassers, who could count them if what is set up in this answer authorized those marks to be counted. Possibly some marks might in some way be fraudulently added after the judges and clerks signed the returns, or what may be more probable, a clerk might unintentionally make an extra mark in a tally without noticing it, or in the dim light election officials sometimes have to contend with, he might, in endeavoring to make a mark more distinct, have two instead of the one. Moreover, as there were five marks in a block (as the petition alleges and the answer does not deny), the presumption would be in favor of the one which consistently had only five, rather than the one which had six marks in three blocks, especially if, as the petition alleges, "said three blocks were in each case tallied by the clerk of election as containing five marks each." Other suggestions in support of the tally sheet having 272 marks might be stated, but it is not necessary.

By section 73 of Article 33 of the Code, at the close of the polls, the judges are required to open the ballot box, "and count and announce the whole number of ballots in the box."

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Then when all the ballots have been canvassed, as directed by the statute, "the election clerks shall compare their tallies together and ascertain the total number of votes received by each candidate, and when they agree upon the numbers, one of them shall announce in a loud voice to the judges the aggregate number of votes received by each candidate." After that each of the judges of election is required by section 74 in turn, to "proclaim in a loud voice the total number of votes received by each person voted for," and "such proclamation shall be *prima facie* evidence of the result of the canvass of such ballots." Section 75 requires the judges to make duplicate statements or returns of the result of the canvass, "showing the whole number of votes in the ballot box, and the whole number of votes given for each person, designating the office for which they were given, and at the end of such statement shall be written a certificate that the same is *correct in all respects*; which certificate and each sheet of paper forming a part of the statement shall be subscribed by the judges and clerks." It is then provided that each of the statements shall be enclosed in an envelope, securely sealed, etc., and in the counties one of the envelopes shall be directed to the Clerk of the Circuit Court and one to the County Commissioners. "*Each set of tallies shall also be signed by the election clerks and the judges of election, and each shall be enclosed in an envelope, securely signed and sealed as aforesaid, one of which shall be addressed to the Board of Supervisors of Election, and the other to the Register of Wills.*"

Then after providing in section 76 for the care of the ballots, ballot boxes, etc., section 77 provides that in the counties "each of said two judges (those who are also registration officers) shall take into his possession one of the registers and also one of the statements of the votes cast, sealed up in its envelope as aforesaid, and also one of the tally sheets, sealed up in an envelope as aforesaid, and the meeting of the judges and clerks shall then be dissolved." Provision is also made for challengers and watchers being

allowed to be inside the guard-rail "and so near that they can see that the judges and clerks are faithfully performing their duties." Section 71.

These and other provisions show the great care taken by the Legislature to secure honest counts and returns, but if the Board of Canvassers, or a majority of them, can ignore the certificates required to be executed with so many safeguards thrown around them, and give a candidate three more votes than the four certificates signed by the six election officials show he had, merely because they find three more marks on one of two tally sheets, then the statute would be a farce instead of affording protection.

Any possible ground upon which the canvassers could claim the right to count more votes for a candidate than the judges and clerks of election return, must be under section 85, unless perhaps there be some error in addition or of some kind too clear for controversy. That section provides that "If, upon proceeding to canvass the votes, it shall *clearly appear* to the canvassing board for the city or county, that in any statement or tally sheet produced to them certain matters are omitted which should have been inserted, or that any mistakes exist," they shall do what?—"they shall immediately issue a subpoena to the judges and clerks who made said return and said judges and clerks shall forthwith attend and shall make such corrections as the facts of the case require, but such changes shall not alter any decision before duly made by them, but shall cause the canvass to be correctly stated; and the said Board of Canvassers are authorized to adjourn from day to day for the purpose of obtaining and receiving such corrected statements, such adjournment not to extend beyond three days."

That section does not authorize the *canvassers* to correct mistakes—"said *judges and clerks* shall forthwith attend and *shall make such corrections* as the facts of the case require," etc. But these canvassers did not even have the judges and clerks before them—on the contrary they changed the vote returned by the six election officials, without doing the only

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thing they were authorized to do, if it clearly appeared to them that a mistake existed, and did not even claim in their answer that any of those election officials had since said or intimated that they had made a mistake. Who has said that the return of 272 votes was a mistake? The canvassers certainly could not know that it was and they utterly failed to inquire of those who might have known, if there was a mistake. They content themselves by saying they had to choose between the two tally sheets and, as we have seen, do not produce any satisfactory reason for selecting the one standing by itself in preference to the other sustained by the several certificates of all of the election officials. If the clerk whose tally sheet had 275 marks on it made a mistake, is Noll to suffer in consequence? Presumably, the clerks did their duty, compared their tallies and ascertained the total number of votes received for each candidate, "*and when they agreed upon the number*" one of them announced the result. If one had 272 and the other 275 for O'Malley, and after ascertaining the number of votes received by him, they agreed upon 272 as correct, is Noll to suffer because the three marks were improperly added, but not scratched off? It is no evidence of a mistake existing when the returns were signed that one tally sheet had 272 and the other 275, for they may have been reconciled by the clerks and the correct figure ascertained, as was their duty to do and what in the absence of something to the contrary they presumably did.

It seems to us that there is no room for controversy, and there can be no doubt that the canvassers had no authority whatever under the circumstances and under our statutes to count 275 votes instead of 272, the number returned by the election officials for O'Malley.

The only remaining question is whether the lower Court should have directed the judges and clerks of election to be summoned, requiring them to attend before the canvassers and make such corrections in the returns as the facts of the case require, etc. The petitioner Noll did not ask for that, and the only reference to section 85 is in the answer in which the defendants allege that it was not mandatory, but

that where the mistake is clearly apparent from a comparison of the two tally sheets, they themselves may "compute and declare the result from the face of the tally sheet, which they believe and decide to be correct; without, as a condition precedent thereto, summoning the election officials, making the returns and requiring them to correct the same." We need only read the statute and the decision of this Court in *Price v. Ashburn*, quoted above, in reply to such a claim. They then go on to say that if it was an error to count 275 votes for O'Malley without summoning the election officials, then the Court may, under section 86, require the defendants to correct said error "by summoning the said judges and clerks of election to make the correction *in accordance with the finding, decision and determination of the Board of Canvassers, as aforesaid.*" In other words, the canvassers do not suggest that the election officials be summoned to make corrections of mistakes they find were made, but such as are "in accordance with the finding, decision and determination" of the canvassers. That would require the Court to first assume that the judges and clerks have made a mistake in not certifying that O'Malley had 275 votes, instead of 272 votes, although it is nowhere suggested in the answer that there was such a mistake beyond the mere fact that the canvassers who say they "had to choose" between the two tally sheets, chose the one containing 275 marks, for the reasons set out in the answer, which reasons, as we have already indicated, are not based on any authority of law or anything which justified them in making such a choice. Of course, the Court did not adopt that suggestion of the defendants, and by that part of its order only intended to require the canvassers to do what section 85 required them to do, if it *clearly appeared* that there was a mistake, when they met to canvass the vote, but under the circumstances we think that there was error in that part of the order.

The petitioner does not admit that there was a mistake in the returns and did not ask for a mandamus to require the canvassers to summon the judges and clerks of election be-

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## Opinion of the Court.

fore them, but on the contrary he is in this Court complaining of that part of the order. If it was necessary and proper to have them before the canvassers in order to correct the error made by the canvassers, we are not prepared to say that the Court could not have included that in its order, although not specifically stated in the prayer for a mandamus, as under those circumstances it would only be requiring what had to be done in order to have the error of the canvassers corrected. But from what we have already said it will be seen that we are of opinion that it is not shown that there was a mistake in the returns of the judges and clerks, and it is not even claimed that they or any of them now say there was in fact a mistake within the meaning of section 85. It by no means follows that because one tally sheet had 275 marks on it, and the other only 272 marks, there was a mistake in the number of votes returned, for, as we have seen, if the 275 marks were on the one when all the ballots had been canvassed, the presumption is that the clerks performed the duty expressly required of them by section 73, that is to say, compared their tallies and ascertained the total number of votes received by each candidate, which they could then accurately do, and it was their duty to do, by again examining the ballots, if necessary, or making such other investigation as could then be made. Moreover, before announcing the aggregate number of votes received by each candidate they presumably agreed upon the number, as the statute requires. If it be suggested that the clerks might not have observed the discrepancy between the two tallies, which would be contrary to the presumption of law, then how could either of them now say that the marks were then there, or that the one with 275 was right and the other wrong? The ballots are no longer accessible to them and they no longer have the means of information which they then had. It is not suggested, much less alleged, in the answer, that it was agreed that 275 was the correct number and that that was so announced, but by mistake 272 was returned.

But beyond all that, section 85 shows on its face that the

Legislature intended that such corrections as were authorized by it should be promptly made, if at all, for while it authorized the Board of Canvassers to adjourn from day to day for the purpose of obtaining and receiving corrected statements, it is provided that "such adjournment not to extend beyond three days." The Legislature undoubtedly realized the danger of granting any considerable time for such corrections, especially when the result is close. We think it would be establishing a dangerous precedent to permit the judges and clerks of election to be now brought before the canvassers for the purpose of correcting returns in such respect as this.

We have not thought it necessary to discuss the cases cited from other States, as none of them reach the controlling questions in this case. By reason of the similarity between the New York statute and our own, the case *In re Stewart*, 24 N. Y. App. Div. 201, S. C. 48 N. Y. Sup. 963, approved in 155 N. Y. 545, is perhaps more instructive and pertinent than most of the others, but we have no doubt about the tally sheets being part of the returns, for our statute makes them so, and we would not be inclined to differ with the New York Courts or the other Courts in reference to many of the matters stated in the cases cited. We have, however, been referred to no case which tends to sustain the action of the canvassers in deliberately ignoring the statute and, without even seeking information from the judges and clerks of election so far as appears in the record, rejecting the returns made by the four judges and two clerks under such circumstances as we have shown above. There is certainly no case anywhere which justified the canvassers, acting under such a statute as ours, in throwing out the vote of the First Precinct of the Second District. So while the attorneys for the canvassers have shown great skill and industry in the presentation of their case, both orally and in their brief, we are unable to adopt their views.

We are of the opinion that there was error in that part of the order of the lower Court in reference to the judges and clerks being summoned, but we entirely agree with it in sus-

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taining the demurrer to the answer and requiring the canvassers to reconvene and to canvass, etc., the votes in the First Precinct of the Second Election District. We will affirm the order in part and reverse it in part and remand the case so that the lower Court may pass an order for a mandamus in accordance with this opinion. It may be well to add that in said order the Court should direct the writ of mandamus to issue as prayed in the petition, commanding the defendants to reconvene as a Board of Canvassers, and to correct the error they made in counting 275 votes for John F. O'Malley in the Sixth Election District, and to state, certify and return that the vote for said O'Malley in that election district was 272 votes and not 275 votes as originally certified by them; also commanding them to canvass the votes for the office of Clerk of the Circuit Court for Howard County in the First Precinct of the Second Election District of said county, as shown by the returns and tally sheets thereof delivered to said Board of Canvassers, and to add up said votes, and requiring them to file with the Clerk of the Circuit Court for Howard County certificates and statements showing that the vote for said O'Malley in the Sixth Election District has been and is recorded by the said Board of Canvassers as 272 votes, and of the result of the canvass of said board of the votes for said office of clerk in the First Precinct of the Second Election District, as shown by the returns and tally sheets thereof delivered to said Board of Canvassers. We do not deem it necessary to prepare the form of the order, as suggested by the petitioner, as the lower Court can do so and can include anything they may deem necessary or proper to carry out our views as herein expressed.

*Order affirmed in part and reversed in part, and cause remanded in order that an order may be passed directing the writ of mandamus to issue in accordance with this opinion, the appellants in No. 110 to pay the costs.*

## JOSEPH HAMILTON

vs.

## STATE OF MARYLAND.

*Criminal law: motions to quash; appeals; provisions of section 9 of Article 5 applicable. Bastardy proceedings: preliminary examination by Justice of the Peace; section 3, Chapter 163 of Acts of 1912; constitutional.*

By section 80 of Article 5 of the Code, the proceedings on appeal, in criminal cases, are the same as on appeals from civil suits. p. 313

Section 9 of Article 5 is applicable to criminal, as well as civil, cases. p. 313

The ruling of a court on a motion to quash can not be reviewed on appeal, unless the facts upon which the motion was based are set out in the record by agreed statement or special finding of the court. p. 314

In bastardy prosecutions, the proceedings before the Justice of the Peace, under Section 3 of Chapter 163 of the Act of 1912, are simply a preliminary examination for the purpose of holding the accused for court, if the evidence justifies it; and such section is not unconstitutional. p. 314

*Decided January 11th, 1916.*

Appeal from the Circuit Court for Baltimore County.  
(DUNCAN, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Wm. H. Lawrence, for the appellant.

Edgar Allan Poe, the Attorney General, submitted the cause on brief for the appellee.

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CONSTABLE, J., delivered the opinion of the Court.

The appellant was indicted for violation of the provisions of Chapter 163 of the Acts of 1912, entitled Bastardy and Fornication, and now codified in Volume 3, Bagby's Code, as Article 12.

He was found guilty and sentenced, in conformity with the Act, to give bond for the maintenance of the child. From that judgment he has prosecuted this appeal.

There are only two points attempted to be raised for the consideration of this Court. The point principally relied upon for a reversal of the judgment is that there was error committed in overruling a motion to quash the indictment. Although the brief of the appellant contains the reasons in support of the motion, nothing appears in the record but the bare mention in the docket entries that a motion to quash was made. We have found nowhere in the whole record, nor is there to be found, any statement of facts because of which the Court was asked to quash the indictment.

There are a great many things for which a Court may be asked to quash an indictment, but from this record we are unable to discover what points or questions were raised or what determined by the Court. Since the enactment of section 80 of Article 5 of the Code by the Acts of 1892, Ch. 506, this Court has held that on appeal the proceedings in criminal cases are to be the same as in civil cases; *Mitchell v. State*, 82 Md. 527. By section 9 of Article 5 of the Code this Court in civil cases has long been prevented from deciding on appeal any point or question which does not certainly appear by the record to have been tried and decided by the Court below; and this Court has held in *Mitchell v. State*, 82 Md. 527, that this section is applicable to criminal as well as civil cases. The precise point we are now considering has been decided by the Court in *State v. Williams*, 85 Md. 231, which was an appeal by the State from a judgment upon the sustaining of a motion to quash an indictment and in which the Court said: "As we have said, there are no facts

set forth in the motion, or what purports to be the motion, it being a statement of a conclusion of law of the most general character. The motion should have clearly and fully stated the facts upon which the defendant relied: *Wharton's Crim. Pl. & Pr.*, Sec. 397, and those facts should have been spread upon the record by an agreed statement or by a special finding of the Court. Questions of law arise out of and depend upon facts, and in the absence of the facts upon which the judgment of the Court below was founded, we cannot entertain an appeal questioning its correctness." In the absence of these facts, therefore, we cannot review the rulings of the Court on the motion to quash.

The only other point was raised by a demurrer to the indictment, although it was practically abandoned at the argument before this Court. It is urged that the Act is null and void because it violates the Fourteenth Amendment of the Federal Constitution. The argument is that it deprives a person of his liberty without due process of law, in that, by section 3 the justice of the peace is required, irrespective of what his belief as to the truth of the charge may be, to commit to the custody of the sheriff any person so accused, in default of such person giving security for his appearance at Court. Just ten days before the judgment was entered in this case, this Court filed an opinion in a case involving the construction of the Act of 1912, in which CHIEF JUDGE BOYD, speaking for the Court, gave a very exhaustive and thorough consideration of its provisions: *O'Brien v. State*, 126 Md. 270. In that case in considering section 3 of the Act it is said: "The proceeding before the justice is simply a preliminary examination for the purpose of holding the accused for Court, if the evidence justifies it." Assuming the point well taken as to the constitutionality of the Act if the fact were as contended for by the appellant, yet by this recent interpretation of section 3 we hold that the Act is free from the constitutional inhibition urged against it.

*Judgment affirmed, with costs to the appellee.*

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Syllabus.

LAURA V. FRANCIS

vs.

CHARLES W. OUTLAW.

*Husband and wife: alienation of affections; damages; suit against wife's parents; burden of proof; to show malice; parents' rights. Prayers: withdrawing case from jury.*

An action by a husband will lie against anyone who has wrongfully alienated the affections of his wife and deprived him of his conjugal rights. p. 316

But in suits of that character against one of his wife's parents, the burden of proof is upon the plaintiff to show that the defendant was prompted by malice in what he had said or done, and the plaintiff must overcome the presumption that the actions complained of were due merely to what the defendant believed to be for the real good of his child and under the influence of natural affection for her. pp. 317-318

In deciding this question of taking a case from the jury, the Court should first assume the truth of all the testimony given to the jury, tending to sustain the plaintiff's right to recover, and of all inferences of fact fairly deducible therefrom; and if, upon consideration of such evidence, it is found of sufficient probative force to enable an ordinary intelligent mind to draw a rational conclusion therefrom in support of the plaintiff's right to recover, the evidence is properly submitted to the jury, by whom its weight and value is to be determined. p. 319

*Decided January 11th, 1916.*

Appeal from the Superior Court of Baltimore City.  
(SOPER, C. J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Vernon Cook and Charles Markell* (with a brief by *Haman, Cook, Chesnut & Markell*), for the appellant.

*S. S. Field*, for the appellee.

PATTISON, J., delivered the opinion of the Court.

The appellee in this case, Charles W. Outlaw, recovered a judgment in the Superior Court of Baltimore City against his wife's mother, Mrs. Laura V. Francis, the appellant, for alienation of his wife's affections, and it is from that judgment this appeal is taken.

The right of a husband to maintain an action against anyone who has wrongfully alienated the affections of his wife and deprived him of his conjugal rights, is now well established by a long line of decisions starting at least so early as the case of *Winsmore v. Greenbank*, Willes Reports, 577, decided in 1745; *Wolf v. Frank*, 92 Md. 138; *Hutcheson v. Peck*, 5 Johns. 196; *Oakman v. Belden*, 94 Me. 280; *Smith v. Lyke*, 13 Hun. 204; *Holtz v. Dick*, 42 Ohio St. 23; *Westlake v. Westlake*, 34 Ohio, 621; *Rice v. Rice*, 104 Mich. 371; *White v. Ross*, 47 Mich. 172; *Tucker v. Tucker*, 74 Miss. 93; *Payne v. Williams*, 4 Baxt. 583; *Glass v. Bennett*, 89 Tenn. 478; *Brown v. Brown*, 124 N. C. 19; *Huling v. Huling*, 32 Ill. App. 519; *Reed v. Reed*, 6 Ind. App. 317; *Multer v. Knibbs*, 193 Mass. 556; *White v. White*, 101 Minn. 451; *Lockwood v. Lockwood*, 67 Minn. 476; *Klein v. Klein*, 11 N. W. Rep. 367; *Harvey v. Harvey*, 75 Neb. 557; *Ger-*

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*nerd v. Gerner*d, 185 Pa. St. 233; *Zimmerman v. Whiteley*, 134 Mich. 39; *Bennett v. Smith*, 21 Barb. 439; *Corrick v. Dunham*, 147 Iowa, 320; *Eagon v. Eagon*, 60 Kan. 697.

The law applicable to this class of cases is well stated in the case of *Multer v. Knibbs*, *supra*, which was a suit instituted by the husband against the parents of the wife for the alienation of her affections. In that case the Court ordered a verdict for both of the defendants; upon appeal the Court sustained the verdict as to the mother, because of a want of evidence against her, but as to the verdict in favor of the father the Court said: "In suits of this kind, brought by a husband against the father of his wife, upon the allegations that the defendant has enticed the plaintiff's wife away from him, alienated her affections, persuaded and induced her not to live with him, and has harbored, secreted and concealed her, it is not (as it might be in an action against a stranger) enough to show that the defendant has actually performed the acts charged, and that they have resulted in an abandonment of the plaintiff by his wife. \* \* \* It is proper for him to give to his daughter such advice and to bring such motives of persuasion or inducement to bear upon her as he fairly and honestly considers to be called for by her best interest; and he is not liable to her husband in damages for her desertion resulting therefrom, unless he has been actuated by malice or ill-will toward the plaintiff, and not by a proper parental regard for the welfare and happiness of his child, in such an action, the material question is the intent with which the parent acted, rather than the wisdom or even the justice of the course which he took. These questions have arisen in other jurisdictions; and so far as we have been able to discover, they always have been answered in the same way. The leading case is *Hutcheson v. Peck*, 5 Johns. 196; and the doctrine there laid down has commanded assent. \* \* \* And the burden is upon the plaintiff to show that the defendant has been prompted by malice in what he has said and done, and to overcome the presumption that he

acted under the influence of natural affection, and for what he believed to be the real good of his child. *Bennett v. Smith*, 21 Barb. 439; *Pollock v. Pollock*, 9 Misc. 82, N. Y. Supp. 37; *White v. Ross*; *Westlake v. Westlake*; *Brown v. Brown*, *supra*; *Young v. Young*, 8 Wash. 81, 35 Pac. 592; *Reed v. Reed*, *supra*. But if there is *evidence upon which the jury would have a right to find* that the defendant has actively interfered to cause his daughter to abandon her husband, and has deprived him of her affections and of the comfort and solace of her society, and has done this from malice to the plaintiff, and not for the purpose of affording proper protection to his child and furthering her true welfare, *then the case must be left to the jury*, with the instruction that, if these facts are proved, the action may be maintained. *Holtz v. Dick*, *supra*; *Price v. Price*, 91 Iowa, 693; *Tucker v. Tucker and Bennett v. Smith*, *supra*; *Williams v. Williams*, 20 Colo. 51; *Railsback v. Railsback*, 12 Ind. Appeals, 659. This was recognized by all the Judges in *Hutcheson v. Peck*, 5 Johns. 196. The question, accordingly, is whether there was such evidence in this case." The italics in the above quoted parts of the opinion in that case are ours.

In the case before us the defendant at the conclusion of the testimony offered four prayers. By the first, she asked the Court to instruct the jury that there was no evidence in the case legally sufficient to entitle the plaintiff to recover. The second prayer asked that the jury be instructed that they "can not find a verdict for the plaintiff unless they find not only that the defendant so influenced her daughter, Laura, as to alienate her affections from the plaintiff, but that in so influencing her daughter the defendant acted willfully and with malice toward the plaintiff." By the third prayer, the Court was asked to instruct the jury "that to establish malice on the part of the defendant, it is not sufficient to show that the defendant advised her daughter or even gave mistaken advice, but it must affirmatively appear that the defendant influenced her daughter, and that such influence

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was exercised with malice and not in an honest effort, whether mistaken or not, for her daughter's welfare"; and the Court was asked by the fourth prayer to instruct the jury "that malice on the part of the defendant in advice to or influence over her daughter, whether before or after marriage, is never presumed; that a mother at all times has a right to counsel and advise her children, married or unmarried, and that all advice or counsel given by a mother to her children, married or unmarried, is presumed to have been given in good faith and without malice, unless the contrary affirmatively appears."

The Court being of the opinion that the evidence offered was legally sufficient to go to the jury tending to show that the defendant had alienated the affections of the wife for her husband, and that in so doing she was moved by malice and ill-will to the plaintiff and not in an honest effort for her daughter's welfare, refused to grant the defendant's first prayer taking the case from the jury, but granted the defendant's second, third and fourth prayers.

The sole question before us upon this appeal, is whether the Court was right in its refusal to grant the defendant's first prayer asking that the case be taken from the jury for want of legally sufficient evidence.

In deciding this question, the Court was first to assume the truth of all the testimony given to the jury, tending to sustain the plaintiff's right to recover, and of all inferences of fact fairly deducible therefrom, in *Leopard v. C. & O. Canal*, 1 Gill, 229; *Hiss v. Weik*, 78 Md. 445; and if, upon consideration of such evidence, it was found of sufficient probative force to enable an ordinary intelligent mind to draw a rational conclusion therefrom in support of the plaintiff's right to recover, the evidence was properly submitted to the jury, by whom its weight and value was to be determined. *Baltimore Elevator Co. v. Neal*, 65 Md. 459; *Jones v. Jones*, 45 Md. 154; *Mallette v. British Assurance Co.*, 91 Md. 481; *Moyer v. Justis*, 112 Md. 222; *Taxicab Co. v. Emanuel*, 125 Md. 259.

The plaintiff was married to the daughter of the defendant on the 14th day of December, 1907, and the final separation occurred on the 27th day of July, 1911. When first married the wife with her husband went to live at the home of the defendant, at Relay, Baltimore County, Md., but the plaintiff, a traveling salesman in the far South, was out of the City of Baltimore much of his time, and consequently was at the house of the defendant only at intervals throughout the year. After 1909 the plaintiff, for reasons stated in the evidence, ceased to make his home with the defendant, although his wife and their child continued to live with her mother, and it was only for three short intervals of time in the latter years of their married life, that the wife lived away from the home of her mother, and that was while living with her husband in or near Baltimore.

The final separation of the plaintiff and his wife occurred as we have said on the 27th day of July, 1911, when the wife left the house occupied by her and her husband, and returned to the home of her mother.

On the first day of September following, proceedings were instituted by her asking for a partial divorce from the plaintiff, and for counsel fees and alimony. She subsequently amended her bill, and asked only for counsel fees and alimony. The case was heard by Judge Burke in the Court below, and was decided adversely to the wife. An appeal was taken to this Court (*Outlaw v. Outlaw*, 122 Maryland, 695), and the decree of the Court was affirmed. But the wife was thereafter granted a divorce from the plaintiff, in proceedings instituted by her in Reno, Nevada, that were pending at the time the aforesaid case was before us on appeal. The record in the former case, a very large one, contains most of the evidence in this case, and because of the character of the evidence this Court ordered that the case be not reported.

It is clearly disclosed by the record in this case that the plaintiff at one time possessed and enjoyed the affection and

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society of his wife, and it is equally clear that these are no longer possessed and enjoyed by him. This much having been determined, we are now to decide whether the evidence offered is legally sufficient to go to the jury tending to show that the affections of the wife for her husband were alienated by the defendant, and if so, whether she in so doing was actuated by malice towards the plaintiff.

As the evidence in the former case embraces practically all the evidence in this case, we have, as a matter of fact, twice read and considered this evidence; in the first case to determine the issues there presented, and in this case to decide the questions here raised, and it is upon such an examination and consideration of the evidence that we have reached the conclusion that there is evidence found in the acts and words of the defendant, legally sufficient to go to the jury tending to show that the affections of the wife for the plaintiff were alienated by the defendant and that in so doing she was actuated by malice toward him. As no good purpose would be served thereby, we will not give a detailed statement of such evidence, consisting as it does of things said and done at different times during nearly the entire period of the married life of the plaintiff, forming an unsavory record of "marital troubles and family dissensions, which may well be allowed to rest in the obscurity of the record."

The judgment of the lower Court will therefore be affirmed.

*Judgment affirmed, costs to the appellee.*

## THE EQUITABLE ICE COMPANY, ET AL.,

*vs.*

GEORGE H. H. MOORE.

*Pleadings in equity: sufficiency of bill; how to be raised; necessity for exceptions. Appeals in equity: questions reviewable; exceptions. Art. 5, sect. 23 of Code: mere reservations of objections not sufficient.*

Where no exceptions are taken to the sufficiency of a bill, it is immaterial whether or not its averments cover the case as proved, and the court must decree according to the evidence.

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The contention that while a plaintiff's remedy is by bill in equity, he has been given a decree which is different in character and effect from the one to which he may be entitled; or that while the bill is adequate for the purpose of an equity proceeding to secure the plaintiff's interests, it is inadequate as a basis for the particular relief decreed, is an objection within the purview of Article 5, section 36 of the Code, relating to appeals in equity; and where no exception to that effect was made and filed below, the question is not reviewable on appeal.

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In such a case, a clause in the answer reserving all lawful objections to any error in the form and substance of the bill, is not sufficient to meet the requirements of that section of the Code.

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*Decided December 16th, 1915*

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Opinion of the Court.

Appeal from the Circuit Court for Prince George's County.  
(In Equity.) (BEALL, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER and CONSTABLE, JJ.

*H. Winship Wheatley* (with whom was *S. Marvin Peach*, on the brief), for the appellants.

*Clarence M. Roberts* and *Edw. L. Gies*, for the appellee.

URNER, J., delivered the opinion of the Court.

The appeal in this case is from a decree which provided for a sale of the real estate mentioned in the proceedings, unless the defendants, within thirty days from the date of the decree, should pay to the plaintiff a designated sum of money. It is contended that the allegations of the bill of complaint do not admit of such an adjudication. The bill was directed to the enforcement of a mechanics' lien claim for work and materials furnished in the remodeling of a building and plant used in the manufacture of ice. The answer disputed the claim, and, a general replication being filed, testimony was taken upon the issues of fact thus raised. After a hearing upon the case as thus developed, the decree appealed from was passed. In consequence of an order given by the appellant to the Clerk of the Court below, for the preparation of the transcript for the appeal, only the bill of complaint, mechanics' lien claim, answer, general replication and prayer of appeal have been included in the record, and the evidence in the case has been wholly omitted. A copy of the opinion which accompanied the decree has since been added to the record by agreement. It appears from

the opinion that the decision reached by the lower Court in favor of the plaintiff was governed by the facts established by the proof. No exception or demurrer was filed to the bill upon jurisdictional or other grounds. The primary question to be determined, in this state of the record, is whether the objection sought to be urged against the bill on appeal can be entertained.

It is provided by Article 5, section 36 of the Code, that on appeal from a court of equity no objection to "the sufficiency of the averments of the bill or petition \* \* \* shall be made in the Court of Appeals, unless it shall appear by the record that such objection was made by exception, filed in the Court from which such appeal shall have been taken." This provision has been repeatedly applied: *Gerling v. Wells*, 103 Md. 637; *Baltimore & Drum Point R. R. Co. v. Pumphrey*, 74 Md. 113; *Ashlon v. Ashton*, 35 Md. 503; *Eyler v. Crabbs*, 2 Md. 154; *Thomas v. Doub*, 1 Md. 327. In view of the explicit terms of the statutory rule from which we have quoted, and in the absence of any exception to the bill of complaint in the Court below, it is clear that we are without authority to decide any question as to the sufficiency of the bill on this appeal. There was a clause in the answer reserving all lawful objections to any errors in the form and substance of the bill, but this indefinite reservation does not meet the requirements of the rule. *O'Neill v. Cole*, 4 Md. 123.

The appellant has endeavored to exclude this case from the operation of the provision we have cited by arguing that the objection he urges does not dispute the general sufficiency of the bill, but merely denies that its allegations are adequate as a basis for the specific relief granted. The bill averred that, by agreement between the plaintiff and the defendant corporation, the former was to be paid in stock and property of the company for the work and material supplied in the remodelling of the factory. It is conceded that upon this averment, and the prayer for general relief, a decree for

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specific performance might have been appropriately passed, if justified by the evidence, but it is insisted that the terms of the alleged contract, providing as they did for compensation through a transfer of an interest in the property to be improved, were incompatible with the existence of a mechanics' lien, and precluded a valid decree for the enforcement of such a claim. The Court below found from the evidence that no compensation was ever paid or tendered the plaintiff, either in money or in the stipulated interest in the stock and property of the defendant corporation, although he fully performed his part of the contract. There could be no doubt, therefore, that the plaintiff was entitled to seek redress in a court of equity. Whether, upon the case which the bill alleged, the decree should be for the specific enforcement of the agreement in reference to the compensation, rather than for a sale to satisfy the asserted lien, is a question which would necessarily depend upon the sufficiency of the bill for the purposes of these respective forms of relief. The objection sought to be raised does not dispute the *jurisdiction* of the Court, since it does not deny that the subject-matter of the suit is within the scope of equitable cognizance, or that the proper tribunal has been selected: *Shryock v. Morris*, 75 Md. 76. If, however, it could be regarded as jurisdictional, the question could not be considered on appeal, as no exception on that ground was entered in the lower Court: *Code*, Article 5, section 37; *Melvin v. Aldridge*, 81 Md. 657; *Hubbard v. Jarrell*, 23 Md. 66. No question is or could be made as to a proceeding by bill in equity being available to the plaintiff as a suitable form of *remedy* for the assertion of his rights in the premises, and hence the case cannot be excepted from the effect of the statute upon the theory illustrated by the case of *Boteler v. Brookes*, 7 G. & J. 155. The contention here is that, while the plaintiff's proper remedy is by a bill in equity, he has been given a decree which is different in character and effect from the one to which he may be entitled. In other words, the bill is admittedly ade-

quate for the purposes of an equity proceeding to secure the plaintiff's interests, but it is claimed to be an insufficient basis for the particular relief decreed. It is obvious that such an objection is within the purview of the statutory provision to which we first referred, and that, not having been duly made by exception filed in the Court below, it is not open for our decision.

But even if we were at liberty to consider the question, we should have no occasion to hold, upon the record before us, that the decree was erroneous. The evidence upon which the case was decided, and which we have no opportunity to review, may be presumed to have justified the decree, even though the bill of complaint were held defective. The proof may have supplied the supposed deficiencies of the bill and have presented a state of facts upon which the decree actually passed would be manifestly the proper mode of enforcing the plaintiff's rights. It is the settled rule that where no exception is taken to the sufficiency of the bill, it is immaterial whether or not its averments cover the case as proved, and the Court must decree according to the evidence: *Schroeder v. Loeber*, 75 Md. 202; *Gerting v. Wells*, *supra*; *Shugars v. Shugars*, 105 Md. 344; *Reed v. Reed*, 109 Md. 695.

*Decree affirmed, with costs.*

Md.]

Syllabus.

W. SCOTT WAY

vs.

J. FRANK TURNER.

*Real estate brokers: commissions.*

To entitle a broker to recover commissions for the sale or purchase of property, he must not only show his efforts or negotiations to accomplish the sale or purchase, but he must show that the sale or purchase was the result of such efforts or negotiations.

p. 329 .

*Decided January 14th, 1916.*

Appeal from the Circuit Court for Talbot County.  
(CONSTABLE, C. J., and ADKINS and HOPPER, JJ.)

The facts are stated in the opinion of the Court.

The cause was submitted to BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

*Alfred L. Tharp*, for the appellant.

*Joseph B. Seth*, *W. Mason Shehan* and *J. Frank Turner*, for the appellee.

STOCKBRIDGE, J., delivered the opinion of the Court.

This suit was brought to recover from W. Scott Way broker's commissions for the sale of his place on Miles River Neck. The plaintiff, J. Frank Turner, is a real estate broker in the town of Easton. Mr. Way placed in his hands for sale

a farm of some 96 or 97 acres on Miles River, and certain of the stock and equipments of the place. The sale price named was \$22,000, upon which Mr. Way agreed to pay a commission of 5%. Mr. Way appears to have also placed the sale of the farm with a number of other real estate brokers, and to have made independent efforts on his own account, in connection with which he procured a number of cuts of his place for the purpose of embellishing a circular which he had prepared, and the use of which cuts he gave to Mr. Turner in connection with a small book which Mr. Turner was getting out to advertise the sale of sixty-five pieces of land in Talbot County, which had been placed in his hands as broker. The Way property was bought by a Mr. Hazard, and the question which this case presents is, whether Mr. Turner was the procuring cause of that sale. If so, he was entitled to his commissions on the sale price, which was \$20,000. If he was not such procuring cause, then he had no claim against the appellant.

The rule of law applicable to this description of cases has been frequently announced in nearly every State in this country, with some slight variations of phraseology. It is concisely summed up in 4 *R. C. L.* p. 298, sec. 43, as follows: "It is not enough that the broker has devoted his time, labor or money to the interest of his principal, as unsuccessful efforts, however meritorious, afford no ground of action. And it matters not after his failure and the termination of his agency what he has done proves of use and benefit to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would never have met; he may have created impressions which under later and more favorable circumstances naturally lead to and materially assist in the consummation of a sale; he may have planted the very seed from which others reaped the harvest; but all that gives him no claim. It was part of his risk that, failing himself, not successful in fulfilling his obligation, others might be left to some extent to avail them-

Md.]

Opinion of the Court.

selves of the fruit of his labor. To entitle a broker to commissions upon a sale or transaction which is actually consummated he must show that his efforts and services were the primary, proximate and procuring cause thereof." And for this statement the author cites, among other cases, *Keener v. Harrod*, 2 Md. 70; *Tinges v. Moale*, 25 Md. 480; and *Blake v. Stump*, 73 Md. 160.

Numerous other Maryland cases might have been cited, such as *Livezey v. Miller*, 61 Md. 336, and *Hollyday v. Southern Agency*, 100 Md. 296. These are all collected and considered in the very elaborate opinion by JUDGE THOMAS in the case of *Martien v. Baltimore*, 109 Md. 260, where he says:

"In the early case of *Keener v. Harrod*, 2 Md. 70, the Court said, 'We understand the rule to be this, that the mere fact of the agent having introduced the purchaser to the seller, or disclosed names by which they came together to treat, will not entitle him to compensation,' unless it appears that such introduction or disclosure was the foundation on which the negotiation was begun and conducted, and the sale made. And in the very recent case of *Walker v. Baldwin*, 106 Md. 634, this Court said: 'All the cases agree that the disclosure of the purchaser's name, and the putting him in communication with the defendant by the plaintiff must not only be the foundation upon which the negotiations were begun, but upon which it was conducted and the sale ultimately made. \* \* \* The broker must be shown to be the procuring cause of the sale. The intervention of the plaintiff in beginning the negotiations, and their subsequent culmination in a sale will not suffice unless those negotiations were the ultimate cause of the sale.' In other words to entitle a broker to recover commission for the sale or purchase of property, he must not only show his efforts or negotiations to accomplish the sale or purchase, but he must show that the sale or purchase was accomplished as the result of such efforts or negotiations."

A number of authorities were cited upon the briefs of the parties from outside of this State, but in view of the long line of decisions in Maryland upon this question, it is unnecessary to go beyond the adjudications of this Court.

The disputed question in the present case is, whether or not the appellee, J. Frank Turner, was or was not the procuring cause of the sale of the farm from Way to Hazard, and subordinate thereto the further question, whether the plaintiff produced sufficient evidence to entitle him to have this question passed upon by a jury, or whether it should have been taken from the jury by the Court, under the first prayer of the defendant.

The facts as testified to, intended to establish Mr. Turner as such procuring cause, were as follows:

Mr. Turner caused to be printed a small book listing sixty-five farms or pieces of land for sale, among which the farm of Mr. Way appeared as number 18, and the cuts illustrating Mr. Turner's booklet were those the use of which had been loaned him by Mr. Way. These books were then sent to all persons inquiring for farms in that section of the State, or to persons who Mr. Turner had any reason to believe might become so interested. One of these books came to the hands of a nephew of Mr. Hazard; Mr. Hazard was at that time in poor health, and looking for a farm in Talbot County, and friends of his in that county, were desirous that he should locate in the Trappe District of the county, in which they or some of them resided. Mr. Hazard together with his nephew and another gentleman went to Eastern and looked at several farms in the Trappe District, none of which suited Mr. Hazard. While on this visit the book of Mr. Turner was examined and consulted, and apparently as the result of such examination, Mr. Mullikin, a friend of Mr. Hazard called by telephone Mr. Turner for the purpose of making inquiry with regard to the farms Numbered 1 and 2 in Mr. Turner's catalogue and was informed that those had been sold. Mr. Turner then called the attention of Mr. Mullikin to the Way place, No. 18 of the Catalogue and the attention

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## Opinion of the Court.

of Mr. Hazard was thereby sought to be directed to it. This place, however, was on Miles Rives and not in the Trappe District. The extent to which Mr. Hazard may have been brought to consider the Way property through this telephonic communication to Mr. Mullikin is uncertain. Mr. Hazard himself positively denies that he was in any way influenced towards its consideration by reason of this communication. There is however, evidence given by a witness named Stevens, that Mr. Hazard talked with him with a view to having Stevens take him to see the Way property in an automobile which Stevens ran, which fact was communicated by Stevens to Turner; but it is equally clear that Stevens never did take Mr. Hazard to visit the place. Subsequently, at just what interval of time is not clear, Mr. Hazard was taken to the place by a man by the name of Walker and found it to his liking and he ultimately became the purchaser.

There is no dispute that Mr. Turner never saw Mr. Hazard until after the sale had been consummated; that he did not give the name of Mr. Hazard to Mr. Way as a possible or prospective buyer of the property, and while Mr. Turner has a recollection of having written to Mr. Hazard with regard to the place, that recollection is uncertain, no copy of any such letter is produced, and Mr. Hazard positively denies the receipt of such a letter. What Mr. Turner did may therefore be summarized in this manner—he did prepare a catalogue in which the Way place was described and illustrated and did so as the result of a contract or agreement with Mr. Way. A copy of this book in some manner came to the hands of Mr. Hazard. Mr. Turner did, by his telephone conversation with Mr. Mullikin endeavor to call Mr. Hazard's attention to the Way property, and he further, through Stevens, endeavored, though fruitlessly, to show the place to Mr. Hazard. Did these acts constitute the primary, proximate and procuring cause of the sale, so as to entitle Mr. Turner to claim commissions? Apparently, Mr. Turner was himself in doubt upon this question. In an interview

with Mr. Way, after Mr. Turner had learned that Mr. Hazard had purchased the Way farm, he said: "I told him furthermore I don't know who sold this farm; I know nothing about it or whether he bought it from you"; and a little later in his examination, in recounting his interview with Mr. Way, he used this expression: "The only dispute is whether I'm entitled to my commissions; that is what I am trying to find out. I want to see what testimony I have and what connection I have in regard to the matter." And at the conclusion of his cross-examination he was asked this question: "Q. Mr. Turner, will you explain to the jury in what other way, if any, you were instrumental in the sale of this farm to Mr. Hazard? A. I have told you all I know about it. Q. There is no other way in which you were instrumental in the sale of this farm? A. I have told you all." It is manifest that there was doubt in Mr. Turner's own mind whether he had been the procuring cause of the sale, and it is clear from the uncontradicted testimony that even if he were the primary means by which the attention of Mr. Hazard was called to the Way property, he was in no sense the proximate or procuring cause of the sale, and, therefore, it was error not to have granted the first prayer of the defendant and withdrawn the case from the consideration of the jury. The judgment appealed from must therefore be reversed.

*Judgment reversed, without a new trial, the appellee to pay the costs.*

Md.]

Syllabus.

FURNESS-WITHY & COMPANY, LIMITED,  
A CORPORATION,*vs.*JOHN T. FAHEY,  
TRADING AS JOHN T. FAHEY & Co.

*Contracts: parol evidence; meeting of the minds. Erroneous rulings of trial court: when no ground for reversal.*

The rule excluding parol evidence to affect a written contract is not infringed by evidence to show that the instrument was void, or that it never had any legal existence or binding force, by reason of there being no meeting of the minds. pp. 336-337

No reversible error can be predicated upon the admission of evidence over objection, when the same evidence is admitted elsewhere in the case without objection. p. 337

The admission of evidence that should have been excluded is no ground for reversal, when it is apparent that no injury resulted therefrom. p. 338

*Decided November 11th, 1915.*

Appeal from the Superior Court of Baltimore City.  
(SOPEL, C. J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URENEB, STOCKBRIDGE and CONSTABLE, JJ.

*John B. Deming* and *George Whitelock* (with whom was *W. Thomas Kemp* on the brief), for the appellant.

*R. E. Lee Marshall* and *John G. Schilpp*, for the appellee.

STOCKBRIDGE, J., delivered the opinion of the Court.

This is the second appeal in this case. The facts out of which it arises are fully set out in connection with the decision of the prior appeal, reported in 124 Md. 110, and the case of *Furness-Withy & Co. v. Gill & Fisher*, 124 Md. 101. In the first appeal this Court passed upon the pleadings, the refusal of the Court to admit certain evidence, and the instructions given to the jury, and the case was remanded for a retrial, because of the errors pointed out in the opinion referred to, in order that the question of whether the three contracts, dated respectively September 21st, 23rd and October 4th, had or had not been modified by a notification by the appellant and "O. K." of John T. Fahey & Co., and if those contracts had been modified, then to determine what the contracts between the parties were.

On the second trial of the case, the pleadings having been completed in accordance with the opinion of this Court, there was left for the determination of the jury, under the stipulation of the parties, only the questions above indicated. As now presented the case comes to this Court upon ten exceptions, reserved to the rulings of the Superior Court upon questions of evidence, none in any way involving the instructions given to the jury, and whether those instructions were correct or not is not now before this Court for consideration.

Md.]

Opinion of the Court.

While the exceptions are ten in number, they all were reserved upon a single theory, so that a seriatim discussion of them is not necessary to a conclusion of this case.

By the pleas which had been filed, the defendant set up as a defense to the plaintiff's recovery, under the three several contracts of September and October, that there had been a parol modification of them, and that modification consisted in notifications on December 2nd designating the ship "Amana" as the particular vessel to carry the grain contracted to be transported by the original contracts; these notifications were in practically identical form, as follows:

"Baltimore, Dec. 2, 1911.

"Mess. John T. Fahey & Co.,

"City.

"Dear Sir—We beg to name steamer 'Amana' expected to sail for Leith Dec. 27th, for 3,000 quarters grain.

"Engagement of Sept. 21, for 3,000 quarters, contract No. 59.

"Respectfully,

"Dresel, Rauschenberg & Co.,

"Signed)

"Agents.

"OK.

"Per A. F. Sidebotham.

"John T. Fahey & Co."

Of such notice it was said in *Furness-Withy & Co. v. Gill & Fisher*, 124 Md. 107: "The effect of this was to render more definite, in one particular at least, the terms of the original contract; and the assent to it on the part of the shipper amounted to a modification of the original contract by mutual consent at a time when it was perfectly competent for the parties so to do, and substitute a particular ship, in place of an open contract which would be gratified by the sending of any ship of that line."

That language was predicated upon the assumption that the words used had a definite, well-understood meaning, and that it was the same in the minds of both parties to the

contracts. If such was the case then the jury would have so found, but if in point of fact there was not such common understanding, then there had been no meeting of the minds, and therefore no modification of the original contracts. This was a question of fact to be determined by a jury, not one of law for the court. The questions put to the witnesses to which objections were made, and to the admission of answers to which the exceptions were reserved sought in one way or another to show what the understanding of the parties was with respect to the nomination of December 2nd. It must be borne in mind that the suit as instituted declared on the original contracts, and that the alleged modification of them had been set up by the defendant, thus casting upon it the burden of proving such modification.

The appellant now claims that in showing the understanding of the meaning of the notification of December 2nd and the "O. K." of the plaintiff thereon, the plaintiff is restricted to evidence of acts, and cannot show by parol testimony, what that understanding was, because to do so would infringe the rule that parol evidence cannot be given to vary, alter or modify a written agreement between parties. This contention misconceives the real issue in the case, viz., whether the written notice of December 2nd was in fact the agreement of the parties, and to be given the full, legal effect of an agreement, or was inoperative and void as never having expressed the real intent of the parties. The line of distinction between these two positions is well recognized in principle, though the facts of any particular case may bring it into a "twilight zone."

The admissibility of parol evidence to show that there was never a real meeting of the minds has been established by a long line of decisions in this State, the leading one among which is the *Southern St. Ry. Adv. Co. v. Metropole Co.*, 91 Md. 61, in which following the earlier cases of *Davis v. Hamblin*, 51 Md. 525, and *Harrison v. Morton*, 83 Md. 456, the rule is announced in these terms: "The rule which excludes parol or verbal evidence to affect that which is writ-

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ten, was not at all infringed by the admission of such evidence to show that the instrument was void or that it never had any legal existence or binding force for want of due delivery and acceptance."

In the same opinion the English cases are cited, and the English rule summarized as follows: "The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."

And the same rule is adhered to in *Birely & Son v. Dodson*, 107 Md. 229; *Colonial Park Estates v. Massart*, 112 Md. 648.

In this last case it was said: "If, therefore, the jury believed Massart's testimony as to the circumstances and *understanding* under which the \$250 were paid by him to the company \* \* \* and there was no binding contract of sale between the parties, the plaintiff" was entitled to recover. In the view of this Court the facts and circumstances of this case bring it clearly within the line of these decisions, and no error can be attributed to the lower Court for its rulings which form the bases for the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th and 10th bills of exceptions.

Some of the questions might have been objected to on other grounds, as palpably leading, but no such objection appears to have been made below, nor has it been pressed here. In each instance where such a technical objection might have been interposed, the evidence so sought to have been elicited came in elsewhere without objection, and no reversible error can be predicated upon the admission of evidence over objection, when the same evidence comes into the case elsewhere unobjected to. *Black v. Bank of Westminster*, 96 Md. 399; *B. & O. R. R. Co. v. Deck*, 102 Md. 669; *Parks v. Griffith & Boyd Co.*, 123 Md. 234; *Rice v. Dinsmore*, 124 Md. 276.

The 7th and 9th exceptions present a somewhat different question. On cross-examination the agent of the appellant was asked as to the steamers of the appellant company, other than the "Amana," trading to the ports of Baltimore, Phila-

delphia or Newport News, at or about the period of time of the Fahey contracts. In the form in which the question was put it was liable to have misled the jury, but that no injury resulted to the appellant is clear. Any possible injury that could have resulted from these questions was obviated by the stipulation of the parties as to the amount of the verdict in the event of any verdict being rendered for the plaintiff. So, even if it be assumed that there was error in permitting these questions to be answered, which is not now decided, the error would constitute no ground for reversal, since it occasioned no injury to the appellant.

The instructions granted by the Court were incorporated in the record, though no exception was reserved to them, and they have not been considered in reaching a conclusion. It is only just to say, however, that they placed the true issues of the case fully and fairly before the jury. Finding no reversible error in the rulings of the Court below the judgment appealed from will, therefore, be affirmed.

*Judgment affirmed, with costs.*

Md.]

Syllabus.

EDWIN M. WILMER

vs.

SUSAN E. PLACIDE.

*Interest publicae ut finis sit litium.*

Wherever an issue exists in an action or proceeding, each of the parties should anticipate that the adversary will offer evidence to support his side of it, and should be prepared with counter-proof. Where he has had such opportunity and does not avail himself of it, or though availing himself of it is unable to overcome the effect of the other side's evidence, he can not obtain what, in effect, would be a new trial of the issue before another tribunal by charging that the judgment against him was procured by fraud. p. 341

Public policy demands that there should be an end of litigation. p. 341

*Decided December 4th, 1915.*

Appeal from the Circuit Court of Baltimore City. (DOLLER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*David Ash*, for the appellant.

*Charles F. Stein* and *John L. Sanford*, for the appellee.

STOCKBRIDGE, J., delivered the opinion of the Court.

This is the fourth time that this case in some aspect of it has been before this Court. The first time was in *Wilmer v. Placide*, 118 Md. 305, and it is with the case then presented that the present appeal is most intimately connected. The full record of the facts contained in the opinion prepared by JUDGE PATTISON in that case renders a repetition of them entirely unnecessary.

In the present appeal a bill has been filed in the Circuit Court of Baltimore City to vacate and set aside the decree entered in the case mentioned, and for various other incidental matters of relief, and reciting with some detail the prior litigation. A demurrer was interposed, which upon hearing was sustained, with leave to amend within a limited time, failing in which the bill was to be dismissed.

For all practical purposes the bill is one under which the complainant seeks to obtain a retrial of the questions which were involved and had been passed upon in the case reported in 118 Md., and the grounds upon which this was asked to be done were, first, fraud; and second, newly discovered evidence.

The fraud alleged in the present bill is said to consist in perjured evidence in the trial of the first cause upon a number of material points, and the allegation as to newly discovered evidence, so far as is disclosed by the bill, consists in the discovery of certain witnesses, who it is averred would contradict this perjured evidence, and that such witnesses were beyond the reach of the complainant, or that he was ignorant of the testimony which they could give, at the time of the prior trial. Elaborate briefs have been filed upon both sides, but the case presented is one to be readily disposed of.

As to the allegation that the decree now sought to be set aside was obtained by perjured testimony, in the view of this

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Court it falls directly under the rule as laid down in the case of *Md. Steel Co. v. Marney*, 91 Md. 360. In that case this Court cited at length, and adopted as the law of Maryland, the rule as announced in *Pico v. Cohn*, 91 Cal. 133. A full collection of the cases upon both sides of this question will be found in an elaborate note to the case of *Pico v. Cohn*, in 25 Am. State Rep., beginning on page 165. See also *Steen v. March*, 132 Cal. 617; *Holton v. Davis*, 108 Fed. 150; *Bradbury v. Wells*, 16 L. R. A. (N. S.) 242, and note in *Bleakley v. Barclay*, 10 L. R. A. (N. S.) 230. Also extensive note in *Little Rock & F. S. Ry. Co. v. Wells*, 54 Am. State Rep. 219, 233.

So firmly is the rule settled that it has been adopted by various text writers. Thus in 2 *Freeman on Judgments*, sec. 489, it is said: "The procuring of a judgment by perjury or subordination of perjury is doubtless a fraud, and such a fraud as would induce equity to grant relief were it not for the fact that its existence can rarely or never be ascertained otherwise than by trying anew an issue already tried in the former action. Whenever an issue exists in any action or proceeding, each of the parties should anticipate that his adversary will offer evidence to support his side of it, and should be prepared to meet such evidence with counter proofs. Where he has an opportunity to do this, and does not avail himself of it, or though availing himself of it, is unable to overcome the effect upon the Court or jury of the evidence offered by his adversary, he cannot, in effect, obtain a retrial of the issue before another tribunal by charging that the judgment against him was procured by fraud."

And for this statement a long list of authorities is cited. In 6 *Pomeroy's Equity*, sec. 649, it is said, that perjury is a fraud, but it does not prevent an adversary trial, and the fraud requisite must be such as prevents the party from having an adversary trial. "This rule seems harsh for often a party will loose valuable rights because of the perjury of his adversary. However, public policy seems to demand that there be an end to litigation."

Instances of the fraud for which the reopening of a case will be granted are, keeping the opposing party away from the Court; a false offer of compromise; where a defendant never had any knowledge of the suit, as in the *Foxwell case*, 122 Md. 263; or where an attorney without authority assumes to represent a party.

In *Payne v. Payne*, 97 Md. 681, the doctrine is also recognized, and authorities might be multiplied almost indefinitely to the same effect. The appellee has cited a number of cases in support of the contention that the perjury alleged amounted to a fraud, for relief from which the case should be re-opened and tried anew. Most of the cases cited are clearly distinguishable from this. For example, in the case of *Cox v. Bennett*, 123 Md. 356, the fraud relied upon was that in the application to take up certain bottoms under the then existing oyster law, they had been described as barren when they were not such in fact, and known to the petitioners not to have been such; but in that case there had been no trial had or judgment or decree entered. The proceeding was an initial proceeding to set aside the grant of the bottom in question, as a "barren bottom." In *Coan v. The Con. Gas Co.*, 126 Md. 506, there was a bill to set aside a deed, which it was alleged had been procured by misrepresentation. The misrepresentations alleged were held to present a case of fraud, if properly established by proof; but in this case also there had been nothing to prevent an adversary trial.

*Graver v. Faurot*, 76 Fed. 257, was cited as supporting the contention of the appellant, and quite a number of other cases to the same effect will be found collected in the notes already referred to in 25 Am. State Rep.; 54 Am. State Rep.; 10 L. R. A. (N. S.) and 16 L. R. A. (N. S.), but they are at variance with the great weight of opinion in this country, and the rule as laid down in this State.

Nor is the position of the complainant any better with regard to the alleged newly discovered evidence. His bill sets out with some particularity the nature of the evidence

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which he expects to be able to introduce under this head, but that evidence consists in what would amount to a contradiction of the appellee's evidence given in the first appeal, and in deciding the case reported in 118 Md., JUDGE PARTISON, speaking for this Court, said: "As we have reached our conclusion almost exclusively upon the conceded testimony in the case," it was deemed unnecessary to pass upon certain exceptions to the evidence. Since, therefore, the original determination was arrived at, almost if not entirely, exclusive of, and apart from the alleged perjured testimony, it is impossible to see how additional evidence to sustain an allegation of perjury could produce any different result.

What has been said is not to be understood as implying any sanction or intimation upon the part of this Court that an allegation of newly discovered evidence would not under any circumstances afford sufficient ground for sustaining a bill of this character. It has been referred to merely to show that if all that is claimed for it, is conceded to be true, still there was no error in the ruling of the lower Court in sustaining the demurrer to the bill of complaint, and the bill should be and is hereby dismissed, with costs.

*Order affirmed, and bill dismissed with costs.*

## WESTERN UNION TELEGRAPH COMPANY

*vs.*

## VICTOR G. BLOEDE COMPANY.

*Telegraph Companies: mistakes in transmission of messages; liability; damages—loss of profits on goods sold. Pleading: variance; appeals; exceptions. Evidence: weight; province of jury.*

Before the passage of Chapter 110 of the Acts of 1914, notwithstanding the provisions of the Code, section 9 of Article 5, relating to the necessity for the raising below of questions as to prayers before the matter can be passed on by the Court of Appeals, yet if prayers referred to the pleadings, the Court was called upon to examine them, and if there was any variance between the pleadings and the proof, such reference in the prayers was deemed sufficient to permit the variance to be availed of on appeal. p. 352

Under the Act of 1914, such a variance can not be taken advantage of by a mere reference in the prayers to the pleadings; but in order to take advantage of such defect, the prayers should set out the point as to which it is claimed a variance exists by referring to that portion of the declaration which it is claimed is at variance with the evidence. pp. 352-353

Where a manufacturer, without any fault of his own, but by the error of the Telegraph Company through which he transmits his message, is made to make an offer to furnish goods at a figure

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lower than he intended, and the offer is accepted, and the manufacture of the goods is begun before the mistake is discovered, then if the manufacture of the goods is such that it must be a "continuous process," to stop the manufacture of which before the completion of the order, would cause a loss greater than would have been occasioned by a sale at the mistaken price quoted, the mere knowledge of the manufacturer, of the existence of the mistake, before the delivery of the goods, will not limit his right of recovery, against the Telegraph Company, to the mere cost of transmitting the message. p. 354

The weight and correctness of evidence is for the jury, and not for the court. p. 354

In general, where an offer for the sale of goods at a certain price is made by telegraph, and, by the mistake of the Telegraph Company in transmitting the message, a lower price is quoted than was intended, the measure of damages, if the goods, at such a lower price, were accepted by the vendee, and obliged to be delivered by the vendor, is the difference between the price named in the telegram, as delivered for transmission, and the price which the seller by the exercise of reasonable prudence and diligence could have obtained for the goods, and not the difference between the price as it was quoted to the Telegraph Company for transmission and the price as actually conveyed to the addressee through the Telegraph Company's mistake. p. 357

The difference between the prices named by the vendor, as he sent it for transmission, and the lower price telegraphed through error by the Telegraph Company, may be accepted as *evidence* of the damages actually sustained, in case the goods were delivered to the addressee before the sender discovers the mistake, if the sender could not reduce his loss by disposing of the goods in any other manner. p. 357

*Decided January 14th, 1916.*

Appeal from the Court of Common Pleas of Baltimore City. (DAWKINS, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, UNER, STOCKBRIDGE and CONSTABLE, JJ.

*W. Irvine Cross* and *Francis R. Cross* (with whom was *Albert T. Benedict* and *Francis R. Stark* on the brief), for the appellant.

*W. W. Parker* and *John R. M. Staum*, for the appellee.

BOYD, C. J., delivered the opinion of the Court.

The Victor G. Bloede Company had an inquiry from the American Paper Goods Company for a price on a carload of envelope gum, similar to what it had previously furnished that company. After some correspondence in which the Paper Company informed the Bloede Company that the price named was too high and asked if a better price could be given, the Bloede Company on March 24, 1914, gave to the Western Union Telegraph Company in Baltimore the following telegram to be sent to the Paper Company: "Offer car delivered four dollars and ninety cents, sixty days net, five per cent. discount for cash. Wire acceptance." That was explained to mean an offer for sale by the Bloede Company to the Paper Company of one car, consisting of 175 bags or 44,250 pounds of envelope gum at \$4.90 per hundred pounds delivered. The message delivered by the Telegraph Company read "four dollars and fifty cents," instead of "four dollars and ninety cents," being in other respects correct. The Paper Company replied the same day by telegram as follows: "We accept your telegraph quotations just received. Order by tonight's mail," and the same day sent the following letter:

"We are in receipt of your telegram this A. M. reading as follows: 'Offer car delivered 450—60 days net, five per cent. discount, for cash. Wire acceptance.' We are pleased to note you have revised your quotation on this car of gum, which enables us to give you the order and keep our gum uniform. In reply to the

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above message we wired you as per enclosed confirmation that we accept telegraphic quotation and would forward order by tonight's mail. We accordingly enclose herewith Order No. 5424, and must impress upon you the fact that the car must be here as early as April 20th."

The order enclosed in that letter was as follows:

"S. T. G. 1.—100 bags light shade envelope gum.  
S. T. G. 2.—75 bags dark shade envelope gum, at 4.50 per hundred f. o. b. Berlin, Conn., 60 days net, 5 per cent. cash 10 days. This confirms telegraph order of today. Gum must be of same quality as you have furnished us in the past and car is to be delivered here not later than April 20th."

On March 24th, Mr. Victor G. Bloede, President, wrote to the Paper Company, acknowledging receipt of their letter of 23rd inst. (which we understand was the one asking for quotations), and stating amongst other things that:

"In accordance with your suggestion, we wired you on receipt of your letter giving you a revised quotation of 4.90 (our previous figure), 60 days net, five per cent. discount for cash, which reduces the net figure at which we are to deliver the carload to you to 4.65½ per 100 pounds, and we are much pleased to receive your acceptance by wire and have entered your order and will make the shipment within the time specified on your original inquiry. We are very much obliged to you for favoring us in this matter, which we believe you will find to your interest. The price named is practically cost of the goods to us at the present cost of crude material, and we will greatly appreciate it if you will consider the transaction as strictly confidential."

On March 25th the Bloede Company wrote to the Paper Company as follows:

"Your favor of the 24th instant covering order and copy of your telegram came duly to hand this morning

and developed the fact that there has been a blunder somewhere in the forwarding of the quotation, as our offer was simply an offer of five per cent. discount for cash on price (\$4.90) previously given you, and not \$4.50 per hundred, as your confirmation states. We were very careful to avoid, as far as we knew how, the possibility of a blunder in sending the wire quotation; and hence immediately called up the manager of the Western Union, who informed us that the price of \$4.90 was correct and had been so forwarded by the Baltimore office to their New Britain office. We then requested them to immediately communicate with the New Britain office and advise us if an error had occurred there, and we are just in receipt of their reply, reading as follows: 'Message was delivered at New Britain \$4.50,' which puts the mistake right up to the Western Union Company. It would be entirely impossible for us to confirm the price of \$4.50, for as we wrote you yesterday, the price we quoted was practically cost, and the price as revised by the Western Union would mean an absolute loss to us, and we cannot hold ourselves responsible for the execution of the order at this figure. We are taking up the matter with the Western Union Company, and will advise you further as soon as we ascertain what their position will be in making good the loss to us, should we book the order."

The Paper Company replied on April 3rd as follows:

"Referring to your favor of the 25th ultimo, as we understand the situation, you are making up the car of gum called for on our order No. 5424, and will invoice it to us at \$4.50 per 100, f. o. b. Berlin, Conn., less 5 per cent. cash 10 days, and that you will collect the difference between that price and the price given to the Western Union Telegraph Company of your city on March 24th. If our understanding of this matter is not correct, kindly write us on receipt of this letter that we may have time to purchase this gum elsewhere before our present supply is exhausted."

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Again on April 8th that company wrote to the Bloede Company:

"We have had no reply to our letter of the 3rd as to whether you were making up our carload of gum or not, and accordingly wired you today, as per enclosed confirmation, and hope to receive some information from you in regard to the situation today."

On April 8th the Bloede Company wrote as follows:

"In reply to your esteemed favor of April 3rd it is our understanding that we quoted you a car of gum on the basis of \$4.90 less 5 per cent., and that your acceptance covers this. It appears, however, that the Telegraph Company made an error in the message as delivered to you, and hence, if you have placed an order with us at a higher price than you could otherwise purchase the same quality, you have been injured to the extent of the difference between our price and that at which you might have purchased. Your claim for the loss, properly supported by the necessary papers, will enable us to present the matter to the Telegraph Company, and feel assured there will be no difficulty in obtaining an equitable adjustment. In the meantime, we have made up the goods, and will forward this week, as we feel sure that all you want is a fair and just settlement of the matter."

On April 9th the Bloede Company also wrote to the Paper Company:

"In answer to your telegram, we wrote you fully under date of the 8th. The car is being loaded now, and expect to forward promptly. Trusting same will reach you promptly, we are," etc.

The gum was shipped and billed on April 11th, and was unloaded on April 20th. The bills arrived before the 15th, and on that date the Paper Company returned the invoice as it was billed at \$4.90, instead of \$4.50. On April 23rd the

Paper Company sent a check on the basis of \$4.50, and on April 27th the Bloede Company returned it, saying:

"We regret that we are compelled to return your check of April 3rd, \$1,800.98, but we can not accept same, as to do so in this form would prevent either of us securing any relief from the Western Union Telegraph Company for their error. In the first place, the price \$4.50 which you tender is much below our actual cost of production, and would mean a serious loss to us. Again, the amount of damage that you have suffered can not exceed the difference between our quotation of \$4.90 delivered, less 5 per cent. for cash, and the lowest bid that you received from other parties on the same grade. This is all that we can compel or expect the Telegraph Co. to pay, and they are willing to settle only on this basis—relying on previous judicial decisions for their stand."

After some further correspondence, the Bloede Company accepted the check and filed a claim with the Telegraph Company. This suit was brought to recover the difference between the price named, \$4.90, and that received by the Paper Company, \$4.50, and having obtained a verdict for that amount, this appeal was taken from the judgment rendered thereon. The only exception in the record is to granting the plaintiff's *second* prayer and its *first* prayer, as amended by the Court, and to rejecting the defendant's *first* and *third* prayers. The plaintiff's first prayer, after submitting to the jury to find the sending of the message by the Bloede Company and the form in which it was delivered, continued: "and that by reason of the erroneous transmission and delivery of said message by the defendant, if the jury shall so find, the plaintiff was thereby caused the loss of the difference between the price quoted by the plaintiff, and the price as delivered by the defendant, that then the plaintiff is entitled to recover from the defendant such difference in price, *unless the jury shall further find that prior to undertaking in any way the*

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*carrying out of the contract by it that the telegram of March 24, 1914, had been incorrectly sent."*

The part italicized shows the amendment of the Court. Something is evidently omitted from that amendment—probably the words "it knew," or something to that effect, were intended to be before the words "that the telegram of March 24, 1914, had been incorrectly sent." The defendant's first prayer, which was rejected, was as follows: "The Court instructs the jury that by the undisputed evidence in the case the plaintiff before the goods were delivered and before booking the order from the American Paper Goods Company knew of the mistake in the transmission of the telegram, and was, therefore, under no legal obligation to make the shipment, and can recover no damages beyond the amount paid by it to the defendant Telegraph Company for the transmission of the telegram to the American Paper Goods Company, on March 24th, 1914," and the third was, "The Court instructs the jury, that, by the undisputed evidence in this case, the plaintiff company knew of the mistake in the delivery of the telegram of March 24, 1914, before it delivered the carload of goods, to the American Paper Goods Company, and under the pleadings in this case the damage must, therefore, be limited to the amount paid by it to the Telegraph Company for the transmission of the telegram of March 24, 1914, to the American Paper Goods Company."

The one chiefly relied on by the appellant is the third, and it contends that *under the pleadings* the plaintiff was not entitled to recover, because the *narr.* alleges that its offer "was at once accepted by said American Paper Goods Company without this plaintiff knowing of the error in said telegraphic message, and said goods were delivered by this plaintiff to the said American Paper Goods Company upon the terms of the original and correct offer of this plaintiff, this plaintiff believing when said goods were delivered by it to said American Paper Goods Company, that they were sold and delivered at the rate of four dollars and ninety cents per hundred pounds, this plaintiff believing further that his original and

correct offer to sell said goods at the rate of four dollars and ninety cents per hundred pounds had been accepted by said American Paper Goods Company," while the evidence shows that the plaintiff did know of the mistake in the telegram before the goods were delivered. The appellee contends that even if the appellant be correct in his theory about the third prayer that it can be of no avail in this Court by reason of Chapter 110 of Acts of 1914, now section 9A of Article 5 (Vol. 3) of the Code, which is as follows: "The fact that a prayer or instruction which refers in general terms to the pleadings was granted or refused by the Court below, shall not be sufficient to show that the point or question of a variance between the pleadings and the evidence was tried and decided in the Court below, as required by Section 9; and the question of such variance shall not be considered as having been raised by any prayer or instruction below, unless such prayer or instruction shall state specifically the points where in it is claimed that such variance exists."

It had been decided in a number of cases that notwithstanding the provisions of section 9 of Article 5, if a prayer referred to the pleadings, the Court was called upon to examine them, and hence if there was a variance between the pleadings and proof it could be thus taken advantage of. The cases of *M. & M. T. Co. v. State, use Hazelton*, 108 Md. 564; *Ward v. Schlosser*, 111 Md. 534; *Smith Co. v. Smick*, 119 Md. 279, and *Baltimore v. Stalford*, 123 Md. 269, are amongst the latest. Inasmuch as the point was not always in fact called to the attention of the Court, judgments were sometimes reversed in this Court by reason of the variance when the lower Court had not in reality passed on the question. Chapter 110 of the Acts of 1914 was therefore passed to correct that, and it is an important statute which should be construed liberally, so as to prevent the injustice which was often done by referring in a prayer to the pleadings generally without calling the attention of the Court or the opposite party to the particular defect complained of. This is the first case that has been before us concerning that Act, and

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we think the prayer should have more specifically set out the points wherein it is claimed that such variance existed, by referring to the portion of the declaration which it is contended was at variance with the evidence. But in addition to that, we do not think the prayer states a correct legal proposition. The amount of recovery may depend upon something more than mere knowledge of the mistake before the delivery of the goods, for it might well be that the seller had good reason to believe that the purchaser would pay the price named in the message given to the Telegraph Company, or that it had, before it knew of the mistake, done something in the preparation of the articles sold which would cause a total or partial loss if not delivered, and hence it would be the seller's duty to do what it could to avoid unnecessary damages, as indeed the second prayer of the defendant in this case instructed the jury. There is testimony that before Mr. Thomas, the Vice-President and General Manager of the Bloede Company, knew of the error in the telegram, he had directed the work to be started. His evidence was in part as follows: "You discovered shortly after the order was accepted by the American Paper Goods Company, that there had been this error made, didn't you? A. When we received the formal printed form of order and discovered there was a discrepancy in the price between that which we had quoted and what they had repeated to us, which I at first thought might be a stenographer's error on account of another correction which had been made with pen in the order, we took the matter up with them at once. Q. And in the meantime did you stop the manufacture of this order? A. No, we didn't, because we couldn't stop the process well after it had begun, and the chemicals were added. It is necessary to make it a continuous process. \* \* \* Q. Was it or not possible for you to have prevented this loss after you discovered the error? A. No, because envelope gum is a peculiar substance that is made up according to the requirements of each individual customer and according to their method of working it, and the class of paper and the different purposes for

which they use it, and the quality of gum that they use, and the American Paper Goods Company has a gum that is made for them exclusively, and which is not used to my knowledge by any other manufacturer, and we would have been compelled to finish the goods after started because if we did not, there would be the danger of spontaneous combustion and we would not have had any orders from that time until the present time for that same quality of gum from any other firm." The weight and correctness of his evidence were for the jury, and not for the Court and hence the Court could not say that if the plaintiff knew the mistake before it delivered the carload of goods it was limited in its recovery to the amount paid by it to the Telegraph Company for the transmission of the telegram.

The question whether one who makes an offer by telegram, which is altered in the course of transmission, and the altered telegram is received in good faith without knowledge of the alteration, is bound by the telegram as delivered has been differently decided. Some cases hold that he is, while others hold the contrary. In *Brantly on Contracts*, 81, that author takes the position that the seller is not so liable, because he never gave his assent to the telegram as delivered, and many cases are to the same effect. But we do not deem it necessary to now determine that question, as we think the documentary evidence sufficiently shows that the Paper Company did not propose to hold the Bloede Company responsible if it refused to deliver the goods at \$4.50. It wrote on April 3rd, after stating their view of the situation, "If our understanding of the matter is not correct, kindly write us on receipt of this letter that we may have time to purchase the gum elsewhere before our present supply is exhausted," and in other letters indicated that it would not attempt to hold it at that price. If, however, the evidence of Mr. Thomas is correct, his company was in danger of sustaining loss by reason of the error in the telegram, regardless of whether it was bound to deliver the gum to the Paper Company, and, if so, it had the right to hold the Telegraph Company responsible for its loss, if any

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was sustained. But the question still is whether it could legally recover the damages allowed by the lower Court. By the second prayer of the plaintiff the jury was instructed that if they found for the plaintiff "their verdict should be for the difference between the price quoted by the plaintiff in the message as delivered to the defendant, and the price quoted by the defendant in its message as delivered by it to the" Paper Company.

There is nothing in the record tending to show that the Paper Company would have accepted the offer, if the message had been correctly delivered to it. On the contrary, the letters from it offered in evidence by the Bloede Company are to the effect that it would not have accepted the offer. The one of April 15th, 1914, said: "We could not receive this material at the price you have invoiced it, as it would be much higher than our other quotations," and as we have seen, they returned the invoice at \$4.90. Mr. Graham, the purchasing agent of the Paper Company, who was called by the plaintiff, in answer to a question on cross-examination as to what was the lowest bid he received besides that of the Bloede Company, replied, "That the other quotation was a verbal one made in the office; that he found no letter confirming it, but a pencil memorandum of such a quotation, of \$4.70 per 100 pounds, less 3%. That less 3% means cash discount, if paid within 10 days of date of invoice."

But in addition to that we do not understand the measure of damages announced in that prayer to be the correct one. The appellee cites 37 *Cyc.* 1771, 1772, and on the first page it is said: "Where in a message quoting a price to plaintiff the price is changed to a larger amount, which is paid by plaintiff, it has been held that the measure of damages is the difference between the price as stated in the original message, and the higher price paid by plaintiff." But that was where the purchaser had paid more by reason of an error in the transmission of the telegram than he would have paid, and it was held that that was the correct measure of damages under those circumstances. What we have quoted above is

followed by this statement; "but on the contrary it has been held that while plaintiff cannot recover more than this difference, he is not necessarily entitled to recover this amount, his actual loss being the difference between the price paid and the market value of the property purchased. Plaintiff is also entitled to recover the loss actually sustained when by reason of an error in transmission he is caused to sell property for a price less than that offered or intended." In *Postal Tel. Co. v. Schaefer*, 110 Ky. 907, S. C. 62 S. W. 1119, cited in the note to *Cyc.*, where the selling offer was changed from \$1.70 to \$1.07 per barrel, and the goods were shipped and the mistake not discovered until the buyer refused to take them and pay the draft, it was held that the measure of damages was the difference between the sum based on \$1.70 per barrel and the amount which plaintiff by ordinary care and diligence could have sold them for at the place to which they were shipped, not exceeding, however, 63 cents, the difference between the two prices named, on the barrel. In *Reed v. Western Union Tel. Co.*, 135 Mo. 661, S. C. 37 S. W. 904, 58 Am. St. 609 and 34 L. R. A. 492, the measure of damages allowed was the difference between the price actually received and the market value of the property. In *West. Union Tel. Co. v. Shotter*, 71 Ga. 760, the offer was "sixty-four" and transmitted at "sixty," it was held, "It was error to charge to the effect that the measure of damages would be the difference between what the vendor received and what he intended to offer the property for; there being no evidence that he could have obtained the price demanded." It was also said that the "measure of his recovery against the company would be the difference between what he actually received for the property and what he would have received but for the mistake, that is, the market value of the property at the place to which the telegram was sent." See also *Ayer v. West. Un. Co.*, 79 Me. 493, S. C. 10 At. 495, and 1 Am. St. Rep. 353; *West. Un. Co. v. Dubois*, 128 Ill. 248, S. C. 15 Am. St. Rep. 109. In 27 *Am. & Eng. Ency. of Law*, 1069, it is said: "When a message announcing prices, sent

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in contemplation of a trade, is erroneously transmitted, the party injured through acting upon the erroneous message may recover the amount of his actual loss caused by the decrease in the price he obtained or, *in case he is a purchaser*, the increase in price he is obliged to pay in consequence of the error." "Where the mistake is discovered by the seller, after the delivery of the goods to the buyer, the measure of damages is the difference between the price named in the telegram as delivered for transmission and the price which the seller could, by exercising reasonable prudence and diligence, obtain for the goods and not the difference between the price named in the telegram as delivered for transmission and as delivered to the addressee. *Pepper v. Telegraph Co.*, 87 Tenn. 554," as stated in note to *Hays v. W. U. Tel. Co.*, 70 S. C. 16. In 3 *Am. & Eng. An. Cases*, 429, it is said in that note: "But the difference between the prices named in the telegram as delivered for transmission and as delivered to the addressee may be accepted as the measure of damages actually sustained by the sender when the goods are delivered to the addressee before the sender discovered the mistake, when the sender accepts payment on the basis of the lower price, and when the sender could not reduce his loss by disposing of the goods in some other manner,"—citing *Fisher v. W. U. Tel. Co.* (Ky.), 84 S. W. Rep. 1179 and *Pepper's Case*, *supra*. Other cases might be cited, but we have found no case which we could follow which sustains the measure of damages fixed by the plaintiff's prayer, under such circumstances as we have in this record. As we have already pointed out, such may well be the damages allowed, when the suit is by a purchaser who has been required to pay more than was intended by reason of the error in the transmission of the message, for the difference between the two prices is his actual and fixed loss, but when the seller sues it is altogether different, for it does not follow that the purchaser would have accepted his offer at the higher price and hence what he actually loses, if anything, is the difference between the price named by him in the telegram and what

he could by exercising reasonable prudence and diligence obtain for the goods—not exceeding the difference between the price named by him in the telegram and what he received from the purchaser. Under some peculiar circumstances there may be some deviation from the rule, as explained in the case of *Pepper v. West. Un. Tel. Co.*, *supra*, but there is nothing in this case to make an exception to the general rule.

The measure of damages therefore fixed by the plaintiff's second prayer was not correct, and it should have been rejected. The plaintiff's first prayer, as originally drawn, submitted to the jury to find whether the difference between the prices named in the telegram sent and the one delivered was the loss of plaintiff, and, if so found, instructed the jury that the plaintiff was entitled to recover the difference, but the modification of the prayer is in such shape (evidently due to some omission) that we cannot tell what was intended, and hence say nothing more as to that. The defendant's first and third prayers were properly rejected because the evidence of Mr. Thomas tended to show that they had commenced the preparation of the gum before they knew of the mistake in the transmission of the telegram, and that having commenced it they could not stop it without a loss, possibly greater than the difference between the two prices. As we have said, those questions were for the jury. It is proper to add that the recovery under the decisions cannot exceed the difference between the two prices, but inasmuch as we cannot say from the record that the jury if properly instructed would have allowed that amount we must reverse the judgment.

*Judgment reversed and new trial awarded,  
the appellee to pay the costs.*

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Syllabus.

## SAMUEL R. BOYD

vs.

JAMES H. SMITH ET AL., EXECUTORS AND TRUSTEES  
ET AL.*Sales in equity: inadequacy of price; raise in price by purchaser.*

Mere inadequacy of price is not sufficient to vacate a sale in equity, unless it be so gross and inordinate as to indicate some mistake or unfairness for which the purchaser is responsible, or some misconduct or fraud on the part of the trustee making the sale. p. 364

Such sales should not be set aside merely because of allegations that offers are made to submit a bid in excess, or somewhat in excess, of the price of the sale reported. p. 365

To set aside such a sale and order a resale of the property upon such offers or bids would be an experiment only, and should not be allowed. p. 366

It would be a dangerous and unsafe practice and one not to be tolerated, to reject sales so made and reported, merely to let in other and higher bidders, when no fraud, misrepresentation, or unfairness is shown, by inadequacy of price or otherwise. p. 366

Where upon exceptions to a trustee's sale it is alleged that particular parties are willing to pay a definite, increased price for the property, and the purchaser at the sale agreed, before the ratification, that his bid for the property should be increased to a sum somewhat larger than that amount, and the report of the sale was so corrected, and a new order nisi passed, then in passing upon the exceptions to the sale, the comparison should be with the corrected price, and not with the original bid. p. 365

*Decided January 11th, 1916.*

Appeal from the Circuit Court of Baltimore City. (Dob-  
LER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE,  
BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

*Thomas Hughes*, for the appellant.

*D. Hopper Emory* and *Rignal W. Baldwin*, for the appel-  
lees.

PATTISON, J., delivered the opinion of the Court.

The appellees, Executors and Trustees under the will of David Carroll, deceased, having the authority under said will to make sale of the property of the testator "either publicly or privately as they shall decide, and when ratified by the Court, to execute deeds of conveyances and valid acquit-  
tances for the purchase money," sold unto the appellant cer-  
tain leasehold property of the testator at and for the sum of  
twenty-six hundred dollars, and on the 26th day of February,  
1915, reported said sale to the Circuit Court of Baltimore  
City, and on that day the Court passed an order ratifying  
and confirming the sale unless cause to the contrary was  
shown on or before the 29th day of March, 1915.

On the 17th day of March, 1915, Duvall and Baldwin, as  
attorneys for certain undisclosed legatees of said David Car-  
roll, deceased, filed exceptions to the final ratification of the  
sale, and asked that it be set aside. The ground of the excep-  
tions being that the property was sold at an inadequate price,  
and in support of this allegation they state in their exceptions  
that "they are informed and believe other parties are willing  
to pay substantially more for the property and they know  
that Mr. J. Wilson Leakin will give and has offered to give

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three thousand (\$3,000) for said lots, and submit herewith his offer for the same."

The appellant on the 20th day of March following filed his petition, asking that the executors and trustees be directed to ignore the offer mentioned in the exceptions and that no action be taken or authorized by the Court without affording him an opportunity to be heard. Upon this petition an order *nisi* was passed granting the prayers of the petition. On the 22nd day of March, two days after filing the aforesaid petition, the appellant, filed his answer to said exceptions, in which he alleges that the sale to him was for "the full market value of the property, that it was entirely fair and deliberate, and made after unremitting efforts of the executors and trustees to make sale of the property, extending over a period of more than one year, and was strictly in accord, in every particular, with the provisions of the will." He further alleges that "after his purchase, he contracted to borrow on mortgage, part of the purchase money, went to the expense of having the title examined, and devoted great labor and time to consummating said purchase, and he submits that the good faith of the executors and trustees, and also this Court, requires that the sale to him should be ratified."

The appellant, on the 7th day of April following, filed his second petition in which he alleged, in addition to the matters and things found in his first petition, that he had been informed that an offer of thirty-two hundred dollars, subject to brokerage commissions, had been made through one Ferguson, but had heard the offer had been withdrawn. The petitioner also alleged that Leakin subsequent to his alleged offer invited the petitioner to his office and offered, upon terms that were declined by the petitioner, but which did not in any manner inure to the benefit of the estate, to withdraw his bid of three thousand dollars and allow the sale to the petitioner, at twenty-six hundred dollars, to be finally ratified and confirmed. The petitioner then alleges that although he thought the amount at which the property was sold to him (\$2,600) was its fair market value, he, nevertheless, to avoid a con-

test, would increase the amount to thirty-two hundred and ten dollars, ten dollars more than the alleged bid of Ferguson, if, by so doing, there would be no further opposition to the ratification of the sale at the increased amount. Upon this petition the Court passed the following order:

"It is ordered by the Circuit Court of Baltimore City, this 7th day of April, in the year 1915, that the sale referred to in the foregoing petition be ratified upon the conditions therein named, provided no cause to the contrary be shown on or before the 23rd day of April, 1915, and provided a copy of this petition and order be served on the executors or their counsel, and on the exceptants or their counsel, or on before the 13th day of April, 1915."

In a petition filed by J. Wilson Leakin on the 20th day of April, 1915, the following facts are alleged: the sale to appellants and the report of such sale to the Court on the 26th day of February, 1915; the offer of three thousand dollars made by him on the 1st day of March, 1915, which, as the petitioner alleged was brought to the attention of the Court; the subsequent offer of thirty-two hundred dollars by Ferguson; the increased offer of the appellant, and the *nisi* order passed thereon. The petitioner then states that he "now shows that he is willing to give a sum of money in excess of that offered by said Boyd," and he asks the Court to pass an order "requiring said Boyd and your petitioner and said Ferguson to make sealed bids for said lots, and that the said property may be sold to the one making the highest bid therefor."

The order upon this petition granted leave to the petitioners to file the same, "as cause why the sale reported on the 7th day of April to Boyd should not be ratified, and that the prayer of the petition be granted unless cause to the contrary be shown on or before the 1st day of May, 1915."

To the second petition of the appellant, filed on the 7th day of April, 1915, an answer was filed by Rignal W. Baldwin, attorney for certain undisclosed legatees of the said David

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Carroll, deceased, in which it is averred that the appellant first attempted to secure the ratification of the sale at twenty-six hundred dollars; that these petitioners thereafter filed the aforesaid exceptions to such sale; that Leakin had offered and was now willing to pay for said lots of land, three thousand dollars; that the petitioners have heard and believe that "William E. Ferguson has offered and is willing to pay three thousand and two hundred dollars for said lands; that in their opinion the land is worth very much more than thirty-two hundred dollars and that if the same were put up at public auction or if in the discretion of the Court they were sold by means of sealed bids, a sum greatly in excess of thirty-two hundred dollars would be realized for said lots, and they are informed that said Ferguson is willing to submit a bid at public auction for *something* in excess of thirty-two hundred dollars for said lots of ground" and the answer then asks "that said sale be not ratified, and that the offer of said Boyd be not accepted."

To the petition of Leakin the appellant on the 26th day of April filed his answer, in which he denied the effect of his offer to increase the purchase price of the property, given to it by the petitioner, and also denied the right of Leakin to intervene, and asked that his petition be stricken from the files of the Court, and the prayer of the petitioner refused. The Court, however, on the 25th day of May, 1915, "adjudged and decreed that good cause to the contrary having been shown, the said exceptions to said sale be and they are hereby sustained and the said sale annulled and set aside," and it was "further ordered that the executors and trustees proceed forthwith to make sale of said lots \* \* \* at public auction," upon the terms therein stated, after giving the prescribed notice of the time, terms and place of sale. It is from that decree that this appeal is taken.

The executors who made the sale were fully authorized by the will of David W. Carroll, deceased, to sell, either at public or private sale, the property sold to the appellant.

The Court by its order of July 17th, 1915, had assumed jurisdiction over the further administration of the estate of David W. Carroll, deceased, and by the provisions of the will the executors were required to report the sale made by them to the Court below, for its approval and ratification, before they could convey the property to the purchaser, and this they did on the 26th of February, 1915.

The sole ground upon which the Court was asked to set aside the sale was inadequacy of price. The law is well settled in this State by a long line of decisions that mere inadequacy of price, standing alone, is not sufficient to vacate a sale, unless it be so gross and inordinate as to indicate some mistake or unfairness in the sale, for which the purchaser is responsible, or misconduct or fraud on the part of the trustee making the sale. *Glenn v. Clapp*, 11 G. & J. 1; *Cohen v. Wagner*, 6 Gill, 236; *Johnson v. Dorsey*, 7 Gill, 269; *Gibbs v. Cunningham*, 1 Md. Ch. 44; *Hintze v. Stingel*, 1 Md. Ch. 284; *House v. Walker*, 4 Md. Ch. 63; *Hubbard v. Jarrell*, 23 Md. 66; *Warfield v. Ross*, 38 Md. 85; *Horsey v. Hough*, 38 Md. 137; *Gould v. Chappell*, 42 Md. 467; *Bank of Commerce v. Lanahan, Trustee*, 45 Md. 396; *Mahoney v. Mackubin, Trustee*, 52 Md. 357; *Loeber v. Eckes*, 55 Md. 1; *Dircks v. Logsdon*, 59 Md. 173; *Chilton v. Brooks*, 69 Md. 584; *Condon v. Maynard*, 71 Md. 601; *Garritee v. Popplein*, 73 Md. 322; *Shaw v. Smith*, 107 Md. 523; *Hunter v. Highland Land Co.*, 123 Md. 644. Before the sale was made by the executors and trustees aforesaid to the appellant an estimate of the value of the property was first obtained from two property brokers, as shown by the certificate attached to the report of sales, in which it is stated that they are acquainted with the property so sold and with its value and that "in their best judgment" the amount named in the report of sale (\$2,600) is its "full value and as much as could reasonably be expected to be obtained at public auction."

There was no evidence taken in the case and the action of the Court on the exceptions was upon the allegations and averments found in the petitions and answers that we have

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so fully set out in this opinion, consisting chiefly of the offers or bids of Leakin and Ferguson made after the sale was made and reported, and, as stated in the petition of the appellant, which is nowhere contradicted, after the property had been offered through numerous real estate agents for over a year before the sale to him.

The offer or bid of Leakin's was three thousand dollars, and that of Ferguson, as alleged in the petition of Leakin's and in the answer of the exceptants, was thirty-two hundred dollars. The appellant after the filing of the exceptions and after hearing of these alleged offers, to avoid a contest, increased the amount at which the property was sold and reported to him, to thirty-two hundred and ten dollars, if the sale at such price were ratified without further opposition; and upon such offer a second *nisi* order was passed.

The offer, it will be seen, was greater than either Leakin's or Ferguson's and was at that time the largest offer that had been made; and as this amount became the substituted purchase price for the property sold, it is unnecessary for us to pass upon the alleged inadequacy of the original price at which the sale was reported. We are to consider and pass only upon the alleged inadequacy of the increased amount which by the offer of the appellant was to be substituted for the amount of the purchase price named in the report of sale, and which offer was so treated by the Court in the passage of its second *nisi* order, and we find nothing in the record even tending to show that this amount was inadequate, except, first, the offer of Leakin's that he will if the sale is reopened and the property offered at public auction or by sealed bids, give "*something*" in excess of the increased amount (\$3,210) to be paid by the appellant, and, second, the alleged offer of Ferguson found in the answer of the exceptants, that he "is willing to submit a bid in excess of *thirty-two hundred* dollars (*ten* dollars less than the increased purchase price) or to *start* a bid at public auction for "*something*" in excess of *thirty-two hundred* dollars for said lots of land."

The allegations and averments do not warrant the conclusion that the sale should be set aside for inadequacy of price, and we find nothing in the record to indicate fraud or unfairness on the part of the executors or the purchaser in connection with the sale so made.

To set aside such sale and order a resale of the property, upon the aforesaid offers or bids, would, in our opinion, be an experiment only, and therefore in opposition to the decisions of this Court; *Bank of Commerce v. Lanahan, Trustee*, and *Hunter v. Highland Land Company, supra*.

It would also, we think be a dangerous and unsafe practice and one not to be tolerated, to reject sales so made and reported, merely to let in other and higher bidders, when no fraud, misrepresentation, or unfairness is shown, by inadequacy of price or otherwise. *Andrews v. Scotton*, 2 Bl. 671.

It thus follows from what we have said that the decree of the lower Court will be reversed and the case remanded that the sale to the appellant of the aforementioned property, at the increased purchase price, may be finally ratified and confirmed.

*Decree reversed and case remanded, with costs to the appellant.*

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Syllabus.

THE MAYOR AND CITY COUNCIL OF HAVRE DE  
GRACE

vs.

A. NELSON LEWIS.

*Taxes: reassessment; increase; failure to give notice or grant  
appeal. Injunction: failure to file ordinance referred to;  
when not a fatal defect.*

Notice and an opportunity to be heard are essential to the validity of every assessment, for the purposes of taxation. p. 372

Upon application being made for an injunction, if the plaintiff has in his possession papers or instruments in writing, upon which his equity rests, they should be filed with the bill. p. 371

Where the right to relief by way of an injunction, under the facts alleged in a bill and admitted by a demurrer to be true, is not based solely upon a municipal ordinance, the mere failure to file a copy of such ordinance with the bill does not render it defective. p. 371

*Decided January 11th, 1916.*

Appeal from the Circuit Court for Harford County.  
(In Equity.) (HARLAN, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

*Thomas H. Robinson* (with whom was *Frederick L. Curnburn*, on the brief), for the appellant.

*J. J. Archer*, for the appellee.

BRISCOE, J., delivered the opinion of the Court.

This appeal is from an order of the Circuit Court for Harford County, in Equity, overruling the defendant's demurrer to a bill in equity, for an injunction to restrain the sale of the plaintiff's property for taxes claimed to be in arrears, and alleged to be due the defendant, the City of Havre de Grace for the year 1914, and requiring the defendant to answer the bill.

The appellee, the plaintiff below, is a resident of the City of Philadelphia, Pa., and is the owner of a valuable tract of land, in the suburbs of Havre de Grace, and within its limits, containing three hundred and seventy acres of land more or less, improved by farm dwelling houses and outbuildings. The property for the year 1913, was rented, and the tenant or tenants resided in the City of Havre de Grace, Harford County, Md. It was assessed prior to the assessment, here in dispute, at the sum of \$18,750, but was subsequently assessed at the sum of \$40,950.00.

By section 24 of Chapter 440 of the Acts of 1878, incorporating the town of Havre de Grace, in Harford County, it was provided:

"That the Mayor and City Council shall once in every seven years, or oftener, if they think proper, appoint two assessors, who shall value and assess the property in said corporation in the same manner and with like authority as county assessors, but in assessing any of the lands within the limits of the city which may be occupied and used as farms, or may be part or parts of farms, such land shall be valued and assessed as lots of ten acres, with the building and improvements thereon, and not by the number of acres in said farm or parts of farms," etc.

And by section 25 of the same Act, it was further provided that:

"Any person may appeal from the assessment of the assessors to the said Mayor and City Council, who may make such deductions therefrom as they may deem just and they may add thereto the value of any prop-

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## Opinion of the Court.

erty which may have been omitted in the assessment, and all buildings and improvements and all property acquired or created since said assessment, and the said corporation shall have power to make transfers of such property as may have changed owners since said assessment."

The bill charges that by virtue of the power and authority conferred by the Charter, the Mayor and City Council of Havre de Grace in the year 1913, appointed two assessors to value and assess all property within the city limits for city taxes, for city purposes, and provided by ordinance, that the assessors before proceeding to assess any of the property, should furnish each person owning property liable to be assessed, blank schedules for the purpose of making out and returning to the assessors a list of all property belonging to them subject to taxation, with their estimates of the value thereof. The ordinance further provided that the assessors should thereafter proceed to properly assess the property, and whenever their assessment should be in excess of the value placed upon it by the owner in his schedule they shall notify the owner, who shall have a right to appeal from the decision of the assessors, to the City Council within thirty days from said notice.

The bill also charges, that the blank schedule was received from the assessors and before the assessment was made, the plaintiff made a return, with his estimate of the value thereof at the sum of \$18,750, the same being the prior assessment of the property, which was duly received and accepted by the assessors, and filed at their office, but that afterwards on the

day of January, in the year, 1914, the assessors valued and assessed the property, at the grossly excessive sum of \$40,950.00. That this assessment was far in excess of the value placed thereon, in the return made by him. That the assessors failed to notify him of the increase of assessment, and in consequence thereof he was deprived of an appeal to the City Council, and that he had no notice thereof until the fall of 1914, when he received a tax-bill for that year.

By the seventh paragraph of the bill it is charged, that the sum of \$18,750, fixed by him in the schedule returned by him was a fair and reasonable valuation of the property, and he was lead to believe, in a conversation he had with them in regard to the value of the property, at a meeting prior to the return, that it would be accepted and assessed by them, at the sum returned by him.

By the eighth paragraph, it is charged, that after he ascertained the excessive assessment, he claimed the right of appeal given by the statute and requested a hearing before the City Council, but was refused.

The bill then charges that the assessment for \$40,950, placed upon the property for the reasons stated in the bill, was unequal, excessive, fraudulent and void, and that this valuation was placed on it by the assessors knowingly and intentionally, for the purpose of injuring and defrauding him, and for the purpose of forcing him to sell and dispose of the property.

The bill also avers that the plaintiff on the 27th of March, 1915, tendered the appellee the sum of \$184.27 in payment of his taxes for the year 1914, calculated upon the former and prior valuation and assessment and at the proper rate, with interest and costs, but was refused, and the defendant has advertised a portion of the property for sale, to pay the taxes levied on the increased assessment.

The prayer of the bill is for an injunction to restrain the sale, as advertised, and for general relief.

It appears that an injunction, in usual form, was granted, with leave to answer, but the defendant demurred to the bill, and contends, in support of the demurrer, first, that the bill is fatally defective, in failing to file a copy of the ordinance passed by the Mayor and City Council of Havre de Grace, with the bill of complaint. Second, that the plaintiff has not stated in his bill, a case that entitles him to relief in equity against this defendant and third, that this Court has no jurisdiction to hear and determine the question of the regularity of the assessment of property in the City of Havre de Grace,

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made under the provisions of Chapter 440 of the Acts of 1878.

The objection that the bill was defective because a copy of the ordinance was not filed as a necessary exhibit therewith, is without force. The right to relief by way of injunction under the facts alleged in the bill and admitted by the demurrer to be true was not based solely upon the ordinance, and there was no necessity for its production to establish the plaintiff's case.

The rule is well settled in proceedings of this kind, that where the plaintiff has in his possession papers or instruments of writing on which his equity rests, they ought to be filed. *Gottschalk v. Stein*, 69 Md. 58; *Washington Co. Water Co. v. Hagerstown*, 116 Md. 497.

But where such a necessity is not present the production of exhibits is not required. *L. C. Smith Co. v. Riddlemoser*, 126 Md. 191; *Balto. v. Keyser*, 72 Md. 106; *Webb v. Ridgely*, 38 Md. 369; *Didier v. Merryman*, 114 Md. 438.

The claim of the appellee for relief in this case is based upon two distinct grounds, first, that the increased assessment of his property was made without notice and is illegal and void; second, because the right of appeal to the Mayor and City Council from the valuation of the assessors, and a hearing thereon, was denied and refused.

Upon a state of facts, such as are alleged by the bill in this case and admitted by the demurrer to be true, we think, the lower Court was entirely right in overruling the demurrer and requiring the defendant to answer the bill.

In *Gittings v. Baltimore City*, 95 Md. 425, it is said: If, therefore, the prescribed notice of such purpose was not in fact given, such alterations and increase was illegal, and if the failure to give such notice had been alleged in the bill, it can not be questioned, that the injunction should have been granted.

The rule is well settled that notice and an opportunity to be heard are essential to the validity of every assessment. *Allegany Co. v. Union Mining Co.*, 61 Md. 545; *Balto. Co.*

v. *Winand*, 77 Md. 522; *Monticello Distilling Co. v. Balto. City*, 90 Md. 416.

In this case, it is alleged by the bill that the return of the property, at the valuation of \$18,750, by the owner, in the latter part of 1913, was accepted by the assessors as a fair and reasonable valuation and assessment of the property, but afterwards, in January, 1914, without any notice to him, they increased the assessment to \$40,950.00, and that this assessment was unequal, excessive, fraudulent and illegal.

But, apart from this, it is alleged, that by the eighth paragraph of the bill that, after the owner ascertained the excessive assessment which had been placed upon his property by the assessors, he claimed the right of appeal and asked for a hearing before the City Council, but was refused.

It would be contrary to reason and the first principles of justice to assess property for taxation without notice to the owner and an opportunity for a hearing.

If the right of appeal, as given by the charter, was denied and refused him, as alleged by the bill, the plaintiff was clearly entitled to redress, in a Court of Equity, and the injunction was properly granted. As was said, in *County Commissioners v. Union Mining Co.*, 61 Md. 545, to say that the property of the citizen may be assessed to any value, however exorbitant, for purposes of taxation, without notice to him, or an opportunity to be heard, would be anomalous in our system of laws, and at the same time revolting to all sense of right and justice.

We think, as was said by JUDGE STONE, in *County Commissioners v. Union Mining Company*, *supra*, it is unfortunate in this case that an answer was not filed and proof taken, so that the actual facts might have been shown, instead of resting the case on a demurrer to the bill.

For the reasons stated, we are of opinion that the bill states a case that entitled the plaintiff to relief, and the Court was right in overruling the demurrer and requiring the defendant to answer the bill.

*Order affirmed, cause remanded, with costs.*

Md.]

Syllabus.

## CHARLES MARX, EXECUTOR OF THE LAST WILL AND TESTAMENT OF JOHN MARX, DECEASED,

vs.

## AUGUSTA MARX.

*Services to decedents: claims against estate; value; experts not necessary; quantum meruit. Evidence: one party being dead. Limitations.*

As between persons not members of the same family, the mere fact of rendering services useful to the party to whom they are rendered, furnishes *prima facie* evidence of their acceptance; and, in the absence of any proof to the contrary, there is an obligation to pay what the services are worth, in the absence of proof of special value. p. 375

But where services are rendered by a member of the family the presumption of law is that the services are gratuitous. pp. 375-376

Where the only evidence of an intention to pay fixes the time as at the death of the party to whom the services were rendered, the Statute of Limitations can not attach before that date. p. 382

In order to justify a claim of services being allowed against a decedent, there must have been a design, at the time of the rendition, to charge, and an expectation on the part of the recipient to pay for the services. The services must have been of such a character, and rendered under such circumstances, as to fairly imply an understanding of payment and a promise to pay. There must have been an express or implied understanding to such an effect. p. 376

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The fact that a wife is suing a decedent's estate, for services rendered by her to the decedent, while the husband is suing the estate for board that had been furnished to the decedent, does not render the husband incompetent, on account of interest, from testifying to the wife's suit as to transactions between his wife and the decedent.

p. 383

In such a suit, it appeared that on several occasions, when the plaintiff was sick, the wife employed another woman to assist in caring for the decedent; evidence of such employment is admissible, as tending to show the condition of the decedent and the extent of care and attention the plaintiff was required to give him.

p. 383

The testimony of witnesses who had frequently talked with the plaintiff while she was rendering the services, is admissible, to show that she had said she expected to be paid for them.

p. 383

Without having to be experts, persons who were personally familiar with the character and extent of the services rendered may testify as to what was their value.

p. 384

*Decided January 11th, 1916.*

Appeals from the Court of Common Pleas of Baltimore City. (GORTER, J.)

Augusta Marx sued the estate of her father-in-law, for services, to him, in nursing him, and caring for his clothes for 559 weeks; the verdict and judgment being in favor of the plaintiff, for \$1,000, the defendant, the executor, took this appeal.

The cause was argued before BOYD, C. J., BRISCOE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

*G. Clem Graetzel and Frank Driscoll*, for the appellant.

*C. Ross Mace and W. Calvin Chesnut* (with whom was *Carroll Hunter* on the brief), for the appellee.

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PARRISON, J., delivered the opinion of the Court.

John Marx, by his will executed in May, 1901, devised to his daughter, Gertrude Sippel, fifteen acres of land in Baltimore County. To his son George he gave the sum of two thousand dollars "or the release of the mortgage" for said sum, held by him resting as a lien upon the lands of George. To Charles, another son, he gave two thousand dollars in cash and a designated mortgage, held by the testator, for the sum of six hundred dollars. To each of his daughters, Lizzie Reinecke and Annie Quick, he gave the sum of two thousand dollars, and to his remaining son, John, he gave the residue of his estate, provided he maintained and supported him so long as he lived. Charles was named as his executor.

The testator made his home with John until September, 1901, when he left and went to the home of his son George, where he remained until his death in June, 1912.

The appellee, Augusta Marx, is the wife of George, and this suit is brought by her to recover for services she rendered to her father-in-law, in caring for and attending to him, "including nursing, washing and mending," for the period he was at the home of George, to wit, from September 15th, 1901, to June 16th, 1912, 559 weeks.

The case was tried by a jury in the Court of Common Pleas of Baltimore City, and a verdict rendered in favor of the plaintiff, upon which a judgment was entered. It is from that judgment this appeal is taken.

The law in respect to actions brought to recover for services rendered, such as we find in this case, is now well settled in this State. As between persons not members of the same family, the mere fact of rendering services useful to the party to whom they are rendered, furnishes *prima facie* evidence of their acceptance, and in the absence of some proof to the contrary raises an obligation to pay what they are worth, there being no proof of special value, *Spencer v. Trafford*, 42 Md. 20, but this is not the rule where the services are rendered by a member of the family of the person served.

In such cases a presumption of law arises that such services are gratuitous; *Bisler v. Sellman*, 77 Md. 496.

The case before us falls within the class of cases last mentioned, and it was so treated by the lower Court and the counsel of the plaintiff in the trial of the case below.

The law applicable to this class of cases is clearly stated in *Bantz, Ex'r. v. Bantz*, 52 Md. 686, where it is said: "In order to justify a claim for services being allowed against a decedent, there must have been a design, at the time of the rendition, to charge and an expectation on the part of the recipient to pay for the services. The services must have been of such character, and rendered under such circumstances, as to fairly imply an understanding of payment, and a promise to pay. There must have been an express or implied understanding between the parties that a charge for the services was to be made, and to be met by payment."

The jury, in determining whether there is an implied contract in such cases, should follow the rule laid down in the case of *Guild v. Guild*, 15 Pickering, 129, and approved by this Court in *Bantz, Ex'r. v. Bantz, supra*, "that if under *all the circumstances of the case* the services were of such a character as to lead to a reasonable belief, that it was *the understanding* of the parties that pecuniary compensation should be made for them, then they might find an implied promise and *quantum meruit*."

The facts found in the record in this case conclusively show that the plaintiff rendered services to the defendant's decedent, and the only question to be determined is whether she is entitled to recover therefor under the law as we have stated it.

The record discloses that the father left the home of his son John because of the treatment of him by John and his children, especially because of the treatment of the children.

George, in his testimony, states that his father said to him, on the occasion that he came to his home, that "John had chased him away," and he asked if he could stay with him.

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The home in which George and his wife lived was small, and this fact was mentioned by George; but the suggestion was made by the father that he build an addition to the house and that he would give him the money with which to build it. After saying this, George said, "he walked over to my wife, and he patted her on the shoulder and said, 'I want you to take care of me as long as I live.' He said, 'You will get paid for it at my death.' He said that John should not have the money because he chased him away."

He also testified that his father would often speak of the care and attention given him by the plaintiff to those who from time to time visited his home, and his father would say on these occasions that "she had to do the work for him and after he was dead that there was money enough there to pay for it, that my brother had money enough left out of his estate to pay for it." Witness also spoke of a conversation his father had with Mrs. Willhouck in 1911, after the death of his son John in 1909, in which he told her that the plaintiff "had to do all his work, clean his room and wash for him and make his bed, and after he dies he says he had money enough there to pay for it."

Mrs. Willhouck, to whom we have just referred, was a friend of Mrs. Marx and had for many years visited the home of the plaintiff two or three times a week, and at times when John Marx, senior, was sick would assist her in caring for and attending to him. Mrs. Willhouck testified that on a visit to the home of the plaintiff, shortly after Mr. Marx, Senior, had come there, she had a conversation with him in which he said that he had come to George's to live, "that he was with John but John did not treat him just as he would have liked, the children especially," and that he was going to make his home with George and his wife. "But that Mrs. Marx should not be forgotten when he was dead, because he intended, as he had made a will, and he had intended for each and every one to have two thousand dollars, with the exception that George Marx was to have the

release of the mortgage"; and his daughter Mrs. Sippel "was to have the other ground. But from the interest and all that was left that was placed in John's name; that Mrs. Marx should be paid out of that for doing what she did for him." Mrs. Willhouck also testified that on subsequent visits to George Marx, so late as 1911, John Marx, Senior, would refer to the subject of Mrs. Marx's treatment of him and her compensation therefor, "that he very seldom spoke of any of his children with the exception of John that he said *had his money*. He often spoke of him with regard to having the money. He said John had his money and that Mrs. Marx would not be forgotten after he was dead, that he had enough money that was left there for her services for working and doing for him." While upon the stand Mrs. Willhouck was asked—Do you know whether Mrs. Marx expected to be paid after the old gentleman's death? To which she replied, "yes, because she often said it."

It is disclosed by the record that at the time of the execution of the will the testator had considerable money in several of the savings banks of the City, and that the bank books showing such deposits were in the possession of his son John, where they remained after the father took up his abode with George. Several years after the testator left the home of John, he on one occasion said to George, as George testifies, "it looks funny I am here and my bank books are down at John's. That is not going to do" and he directed George "to hook the horse to the buggy" and they would go down and get them. They went to John's and the father said to him "John I want those bank books; that money in those bank books belongs to me" and John gave him the books. After reaching home the father went to the room of George, and said to him, handing him the books, "you keep these, that in case of fire you will know where they are." George took them and placed them in a drawer, which he locked, and there they remained for sometime when, on one occasion, he examined them and not being able to understand

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them, as he was "not much on figures," he, in 1904, got one Hedeman, who at times came to his house on business, to examine and to explain the books to him and it was then shown that the aggregate amount on deposit in the banks issuing the books, was \$11,964.30. These books, as testified to by George, remained in his possession for nearly two years, when his father said to him "George, you attend to those bank books in town and have the interest put in them." In reply thereto George said "I don't know anything about them banks," and his father said, "what, you don't know anything about the banks? \* \* \* Well then, take them down to John and let John take them down and have the interest put in them." He took them down and gave them to John after telling him, as he had been directed by his father, to carry them to the bank and have the interest put in them. He said "all right" and George never again had the books in his possession. The father thereafter spoke of them but said it made no difference whether the books "laid here or there." He said "the money in these books belonged to him." George also testified that while the books were in his possession not one cent was drawn from bank on them. His father, at such time, had another book upon which he drew what money he needed, although he never saw "inside" that book.

The books remained with John until they were given by him to his brother Charles, this was in consequence of a conversation had by George with John while on a visit, with his wife, to the home of John. At this time John was in bad health and was worried because he had these books and did not seem to know what disposition to make of them. He said his having the books "might make trouble." George said to him "you don't have to worry about that. I will see my attorney tomorrow and I will ask him what you should do about it, and he said alright, I wish you would." George saw his attorney, Mr. Mace, and was told by him that John should give the money either to him (George) or Charles. He thereafter saw John and told him what his attorney had

said. He heard no more from John as to the disposition of the books and did not know what he had done with them until told by Charles that he had given them to him.

This was told him while John was at Sheppard Asylum. In conversation with Charles, George asked him, "Say, Charlie, did John transfer you this money. He said 'Yes, I got that, that is all right.' So I didn't bother any more about it."

After the death of the testator Charles qualified as executor and filed the inventory of his decedent's estate. It contained but two items. The first being the mortgage from George, \$2,000.00, and the other "cash on deposit with Alexander Brown & Sons Banks, \$6,057.61"—total, \$8,057.61.

We have gone very fully into the evidence as to the deposits in the various savings banks of the City of Baltimore, not for the purpose of showing to whom the money so deposited actually belonged, but to show that these deposits were regarded by John Marx, Senior, as his property, and that it was to this money, forming as he thought a part of his estate, that he referred to when he told the plaintiff she would be paid at his death; that, "John should not have it because he chased him away" and did not continue to maintain and support him. It was to this money that he referred when he said, as stated by George, that plaintiff had to do "all his work, clean his room and wash for him and make his bed and after he dies he says that he had money enough *there* to pay for it"; and it was to this money also that he referred in his conversation with Mrs. Willhouck when he said "John had his money and that Mrs. Marx would not be forgotten after he was dead, that he had enough money that was left there for her services for working and doing for him."

In deciding the question here raised we need not determine whether this money belonged to John Marx, Senior. It was thought by him to be his money, and he considered and treated it as part of his estate, out of which the plaintiff was to be paid for her services.

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## Opinion of the Court.

If it was the expectation of Mr. Marx, at the time the services were rendered, that the plaintiff should be paid therefor at his death, out of his estate, and it was her design to charge for such services, the fact that this money was not his and did not form a part of his estate at the time of his death could not defeat the plaintiff's right to recover. The plaintiff was not to look to any special fund or to any particular part of his estate for pay for her services. She was to be paid out of the estate. The fact that this money in bank was so frequently referred to was, no doubt, to give assurance of his ability to pay for such services out of his estate; and we may add that if all this money, transferred from John to Charles, had been regarded and treated as belonging to it and had been returned into the estate of John Marx, Senior, the estate would be sufficient to pay all indebtedness of the testator, including the claim of the plaintiff, as well as the legacies amounting to six thousand dollars; but five thousand dollars of the money transferred by John to Charles was withheld by him, upon the claim that John—a man of very moderate means—who died leaving a widow and five children, gave it to him “in his own right.”

The first, second, third and fourth prayers of the defendant asked, that the case be taken from the jury. These, we think, were properly refused, as there was evidence sufficient to go to the jury, tending to show not only that the services were rendered by the plaintiff to the defendant's decedent, but also that he, at the time of their rendition, expected the plaintiff to be paid therefor, at his death, out of his estate, as any other debt of his remaining unpaid at such time would be paid out of his estate; and that it was the design of the plaintiff to charge for such service, for she had been told by John Marx, Senior, when called upon to render the service, which she thereafter performed, that she would be paid therefor and she had told Mrs. Willhouck that she expected to be paid for such services. This evidence was certainly sufficient to go to the jury tending to show a design on her

part to charge for her services. The fifth prayer was also properly refused. It was offered on the theory that there was no evidence of an expectation on the part of John Marx, Senior, to pay for the services of the plaintiff and no design on her part, at the time they were rendered, to charge therefor, and that, being a daughter-in-law of the recipient of such services, she was not entitled to recover for them. The eighth, ninth and thirteenth prayers of the defendant as to the Statute of Limitations were also properly refused, as the only evidence in the case as to when the compensation for plaintiff's services were to be paid was that it should be paid at the death of the decedent, and the services were continued to the time of his death. His fourteenth prayer, which confines the plaintiff's right to recover to the existence of a contract, by which she was to receive two dollars per week for her services, was also properly refused, and we find no error in the Court's refusal to grant the defendant's fifteenth prayer.

The first prayer of the plaintiff properly states the law, as to the plaintiff's right to recover in this case, and by her second prayer the law as to the Statute of Limitations is properly stated, and we find no defect in her third prayer.

There are fifteen exceptions in the record relating to evidence. The first is to the action of the Court in permitting the husband of the plaintiff, George Marx, to state what was said by his father to the plaintiff in relation to the services she was to render him and the compensation therefor.

The objection urged against the admissibility of this testimony, if we correctly understand the contention of the defendant, is that the husband and wife are so connected in this suit that a verdict in favor of the wife would result to the benefit of the husband, and for such reason he should be regarded as one of the parties to the suit.

The wife, the plaintiff, is suing for services rendered by her to the decedent, while the husband is suing in another action for board furnished by him to the decedent. To hold

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that the husband is not competent to testify as to transactions between his wife and the decedent, in a suit by her against him for personal services rendered by her to him because he might, as her husband, be benefited by the recovery of a judgment by her, would not only be extending the meaning of the "Evidence Act," section 3, Article 35 of the Code of 1912, beyond that heretofore given to it, but such a construction of the Act, we think, would be unwarrantable.

The second exception was to the action of the Court in allowing the said witness to testify that at times when the decedent was sick the plaintiff was unable to care for him without assistance and that Mrs. Willhouck assisted her, and on one or more occasions the plaintiff paid her for her services. This evidence tends to characterize the condition of the decedent and to show the extent of care and attention that the plaintiff was required to give to him, and as the amount of compensation to which she was entitled was dependent upon the character and extent of the services rendered, this testimony was admissible for such purpose, if for no other.

The third and ninth exceptions were to the action of the Court in permitting both George Marx and Mrs. Willhouck to state that the plaintiff was expecting pay for her services. She, during the period of the performance of these services, had frequent conversations with these witnesses in relation thereto, and had at such times not only expressed herself in a general way indicating that she was expecting pay for such services, but had said in express terms that she expected to be paid therefor and discussed with them certain facts and circumstances in connection therewith; it had previously been disclosed in the course of the trial that the plaintiff had been approached by the decedent and had been asked by him to perform these services, with a promise from him, made at such time, that she should be paid therefor. Therefore, we think, it was proper to admit this evidence as showing that at the time of the rendition of these services there was a design on her part to charge therefor and that she expected to be paid for them.

The fourth and tenth exceptions were to the admission of evidence as to the value of the services rendered by the plaintiff.

These witnesses, George Marx and Mrs. Willhouck, were not testifying as experts, but as persons familiar with the character and extent of the services rendered. The husband was present much of the time when the services were being performed, and the other witness was at the home of the plaintiff two or three times each week and at times assisted her in performing such services, and was, as she states, familiar with the value of these services. This evidence, under the facts and circumstances stated, was properly admitted.

The fifth, sixth, seventh, eighth, eleventh, twelfth, thirteenth, fourteenth and fifteenth exceptions are to the admissibility of certain testimony given in relation to the deposits in bank. This evidence, as we have said, was not offered to show to whom the money actually belonged, but for the reasons heretofore stated, and was not, we think, improperly admitted.

The judgment of the lower Court will be affirmed.

*Judgment affirmed, with costs to the appellee.*

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Opinion of the Court.

CHARLES MARX,  
EXECUTOR OF THE LAST WILL AND TESTAMENT OF  
JOHN MARX, DECEASED,

vs.

GEORGE MARX.

*Decedents' estates: action for board; intention; evidence.*

Where part of the answer of a witness is admissible, it is error to strike out the whole answer. p. 387

In an action against the estate of a decedent, for board furnished by his son, the testimony of a witness, to whom the decedent read a paper written by him bearing upon that question, is admissible as reflecting upon the issue. p. 387

*Decided January 11th, 1916.*

Appeal from the Court of Common Pleas of Baltimore City. (GORTER, J.)

George Marx sued the estate of his deceased father for board he had furnished for 559 weeks; the verdict and judgment being in his favor for \$885; the executor took this appeal.

The cause was argued before BOYD, C. J., BRISCOE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

G. Clem Graetzel and Frank Driscoll, for the appellant.

C. Rose Mace and W. Calvin Chesnut (with whom was W. Carroll Hunter, on the brief), for the appellee.

PATTISON, J., delivered the opinion of the Court.

In this case the action was brought by the appellee, George Marx, to recover for board furnished by him to his father, the defendant's testator, from September 15th, 1901, to June 16th, 1912.

At the time of the institution of this suit an action was brought against this defendant by Augusta Marx, wife of the appellee, to recover for services rendered by her to the decedent, during the same period of time.

The case of the wife was first heard, and by agreement of counsel, it was understood and agreed that the evidence taken in her case should "be considered as regiven in this case with the exception that the testimony of George Marx \* \* \* as far as it relates to any transaction or conversation with John Marx, Senior," should not be regarded or considered as evidence in the husband's case; and it was agreed that the exceptions there taken were to be made and considered in this case. The additional evidence consists chiefly of the testimony of Augusta Marx as to transactions and conversations of her husband with the decedent in relation to board furnished by him to the decedent.

The law of this case, as to the right of the plaintiff to recover, is the law of that case, *Charles Marx, Ex'r. v. Augusta Marx, ante*, p. 373, and we will not prolong this opinion by again stating it here.

The prayers are practically the same, changed only to suit the character of the claim, with the same rulings thereon.

The testimony of George Marx in the wife's case, as far as it relates to transactions and conversations with the decedent, is not to be considered in his case, but in substitution for it is the testimony of the wife, and after a careful consideration of her testimony, in connection with the testimony of others, so fully set out in our opinion in her case, we find no error in the Court's rulings upon the prayers offered by the defendant asking that the case be taken from the jury for want of legally sufficient evidence.

As we have passed upon the prayers in that case, it be-

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comes unnecessary, because of the similarity of the two cases, to discuss them again and therefore we simply state that we find no error in the Court's rulings thereon.

There are six exceptions in the record relating to the evidence, to which we will briefly refer. The first three are to the action of the Court in admitting certain testimony of Mrs. Marx. The first is to the refusal of the Court to strike out an answer of the witness. A portion of the answer was certainly admissible, and if there was any part of it not admissible, the whole should not be stricken out because a part of it was inadmissible. The motion should have been to strike out the objectionable part of the answer, stating it in the motion (*Baltimore & Ohio R. Co. v. Whitehill*, 104 Md. 314), and as this was not done there was no error in the Court's refusal to strike out the whole answer. The second exception is to an incomplete answer of the witness, while the third is to the answer when completed. In this exception the witness gave the contents, as it was read to her by the decedent, of a paper written by him in German, containing some reference to the payment of board to George, which was so written that only parts of it could be read by others, and its meaning could not be ascertained. The contents of the paper as he read it to her we think was admissible as reflecting upon the issue, whether he expected George to be paid for his board.

As to the fourth exception the witness stated what was usually paid for board, such as was furnished the decedent, but concluded by saying she would leave that to the jury to determine. The character of the board was, of course, known to her, no one could have been more familiar with it, as the food was prepared by her, and having a general knowledge of its value, as she testified, she was properly permitted to state its value. Nor was there any error in the Court's ruling upon the fifth exception, for what we have said of the fourth applies to this exception. The Court was also right in its ruling upon the sixth exception.

The judgment therefore will be affirmed.

*Judgment affirmed, with costs to appellee.*

LLOYD RICHARDSON AND ISAAC LEGATES,  
TRADING AS RICHARDSON & LECATES,

vs.

MAX SALTZ AND MEYER SALTZ.

*Mechanics' lien: goods sold to contractor; when not agent of owners; when no lien for materials delivered; deficient notice.*

The owners of a lot of ground contracted with a builder to erect for them a building upon the lot; the builder contracted with R. & L. for all the stone to be used on the structure; a month after the last of the stone had been delivered, the owners took possession of the uncompleted building and finished the same, making use for that purpose of the unused stone left upon the premises; notice to claim a lien under the Mechanics' Lien Law had been made upon the owners by the material man, within the time prescribed by the statute: *Held*, that there was an absolute sale and delivery of the stone to the contractor, and that regarding such purchase the contractor could not be considered as the agent of the owners. p. 392

The fact that the owners took possession of the unfinished building and the unused stone did not change the relation of the parties, in so far as the Mechanics' Lien Law was concerned. p. 392

The material man's right to compensation from the owners depended upon their perfecting their lien according to the mandate of the statute. p. 392

A letter from the material man to the owners, written sixty days after the last delivery of the stone, notifying them that the material man had furnished the stone, and requesting payment of the same, to which letter the owners never replied, did

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not bring the material man within the protection of the Mechanics' Lien Law. p. 392

The failure of the owners to reply to the letter did not amount to an implied promise to pay. p. 392

The principle that where an account rendered by one party to another, with whom he has had relations, is retained by that party an unreasonable time, without his making any objection to its accuracy, the account may be considered as correct, has no application where the parties are strangers, in no contractual relation. pp. 392-393

The principle that the notice, required under section 11 of Article 63 of the Code, is unnecessary where the owner is also the builder, as decided in former cases, has no application where an owner becomes the builder, without having been the original purchaser of the materials, either directly or by agent. p. 393

*Decided January 11th, 1916.*

Appeal from the Circuit Court for Somerset County. (In Equity.) (STANFORD, J.)

The facts are stated in the opinion of the Court.

The cause was submitted to BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, UNER, STOCKBRIDGE and CONSTABLE, JJ.

*Joseph L. Bailey* and *Thos. S. Hodson* submitted a brief for the appellants.

*Clarence P. Lankford* and *Henry J. Waters* filed a brief for the appellees.

CONSTABLE, J., delivered the opinion of the Court.

The appellants filed a bill in equity to enforce a mechanics' lien, and, upon the Court sustaining a demurrer filed thereto, this appeal was taken.

It is conceded by the allegations of the bill that no notice of an intention to claim a lien was served upon the appellees within sixty days from the date of furnishing the materials, as provided for by section 11 of Article 63 of the Code, but it is claimed by the appellants that, because of the situation of the parties as presented by the facts alleged in the bill and admitted by the demurrer, no such notice was necessary to perfect their lien. That is, while admitting the force that must be given to the many decisions of this Court wherein it has consistently been held that the party furnishing materials shall not be entitled to a lien for materials furnished to any person other than the owner of the lot on which the building may be erected, or his agent, unless the party furnishing the same or his agent shall give notice, within sixty days of furnishing the same, to the said owner or his agent, of the intention to claim the lien, but urge that the facts do not bring this case within the provisions of that section. If, however, the facts do bring it within the operation of said section, the Court below was correct in its ruling upon the demurrer, for such notice is obligatory upon the part of the one claiming the lien, and, because of its omission, the proceedings would be fatally defective. *Conway v. Cook*, 66 Md. 290; *Reindollar v. Flickinger*, 59 Md. 469; *Hill v. Kaufman*, 98 Md. 251; *Wehr v. Shryock*, 55 Md. 336; *Frederick Bank v. Dunn*, 125 Md. 392.

The bill alleges that the appellees are the owners of a lot in the town of Crisfield, where they also resided, and that they contracted with one Fred B. Hobson to erect a building upon said lot, and that Hobson contracted with the appellants for the furnishing of all the stone work to be used in the building; that the stone was consigned to Hobson, under the contract between the appellants and Hobson, the last delivery being on July 29th, 1914; that on August 29th, 1914, after a considerable quantity of the stone had been used in the building the appellees took possession of the uncompleted building, and one of the appellees finished the building,

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using the remainder of the stone therein; that on the 9th of September, 1914, the appellants wrote one of the appellees, stating that they had been informed that he had taken over the contract for the building and notifying him that they had furnished the stone for the same and requesting payment from him. This letter makes no mention of an intention to claim a lien, and there is no contention that it does comply with section 11. It is further alleged that no reply was received to this letter nor to like ones sent later; and that the appellees continued the building to completion paying to the workmen employed by Hobson the arrears owed by Hobson, and did not pay to Hobson anything on his contract price after August 29th, 1914, the date of the taking over of the contract. The lien claim filed upon the same day as the bill, December 14th, 1914, recites in full the letter from the appellees to Hobson, dated August 29th, 1914, notifying him that since he had failed in the performance of his written agreement with them, they were going to take possession and complete the building according to the contract and hold him responsible to his agreement. We have substantially embodied in the above the allegations of the bill, omitting the conclusions of law there contained, for, of course, the demurrer does not admit the correctness of those conclusions.

Can the builder Hobson be considered as the agent of the appellees in the purchase of the materials, and thereby render a notice unnecessary under the language of the Act? The doctrine of agency has been fully recognized in *Weber v. Weatherby*, 34 Md. 656. In that case the owner and builder agreed to sell a house in an unfinished condition, and to have it completed like one adjoining. The purchaser deposited a sum of money as a forfeit for non-fulfilment of his contract. The prospective purchaser purchased a range such as the adjoining houses had, which was delivered, with the knowledge of the owner, and bricked up in the cellar. The purchaser abandoned the contract, and the owner retained the house, range and forfeit. It was held that the

prospective purchaser was the agent for the owner in the purchase of the range and that a lien attached.

While the reasoning in that case is easily followed, it is difficult to see how the builder in this case can be considered the agent of the owner. There an owner of a house yet to be completed permitted one, during the pendency of a contract of purchase, to intervene and assist in its completion, to the extent, at least, of recognizing his acts and entering no objections thereto; while in the present case the appellees had entered into an ordinary building contract with Hobson, he to furnish work and material and they to compensate him. Under the provisions of Article 63 of the Code the material men had ample protection, and, in fact, many decisions have recited that its provisions were enacted primarily for their protection. The allegations of the bill clearly show that there was no element of agency in the dealings between the appellants and Hobson. It plainly appears that there was an absolute sale and delivery to Hobson, and we find no facts stated which would justify us in finding Hobson was acting as the agent of the appellees. The fact that they took possession of the building, including the stone already used as well as that not used, cannot change the relations of the parties, so far as the application of this statute is concerned. The title to the stone had forever passed from the appellants, and their right to compensation was conditioned upon the payment by Hobson or upon their perfecting their lien according to the mandate of the statute.

Nor can we agree with the contention of the appellants that, because the appellees refused to reply to their request for payment there was created an implied promise upon their part to pay and that therefore they are entitled to their lien. This contention is based upon that line of cases where an account having been rendered by one party to another and retained an unreasonable time without objection, it is regarded to be correct and becomes an account stated. It is difficult to see how this principle can have any application to the facts here. That principle may well apply to parties

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between whom there have been dealings, but not in a case where the parties are strangers entirely to the contract.

It may be that the allegation as to the appellees not having paid Hobson anything since the taking over of the contract on August 28th, was inserted for the purpose of showing that the owner had funds in his hands, at the time of filing the lien claim, which could be applied to the payment of the claim. This was raised in *Truesch v. Shryock*, 51 Md. 162, and the Court said: "But the right of the material man to his lien, does not depend on, nor is it in any manner affected by the question whether the owner has, or has not, money in his hands due the builder, nor whether the former has performed his part of the contract with the latter. As we have said in a former part of this opinion, the lien attaches upon delivery of the materials, and this irrespective of the contract or dealings between the owner and builder."

We have also had pressed upon us the remedial character of the Act as declared in section 41, and have had cited *Real Estate Co. v. Phillips*, 90 Md. 515, where it was held that the notice under section 11 was not necessary where the owners were also builders. That case is clearly distinguishable from the present from the fact that in it the builders and owners made the contract with the material men while in this the owners, who later became builders, were not the original purchasers of the material.

We are of the opinion, therefore, that the notice of an intention to file having been omitted for over sixty days from the date of delivery the lien was lost.

*Order affirmed, with costs to the appellees.*

## JOSEPH ABROMATIS

vs.

JOHN T. AMOS, ET AL.

*Ejectment: "not guilty"; effect of plea. Damages: Code, Art. 75, section 71; evidence; mesne profits. Rental value: improvements. Appeals: immaterial errors. Practice: voluntary appearance: effect of—. Misnomer: correction; discretion of court. Taxes: sale for—; levy: service of—; owner of property.*

In an action of ejectment, a plea of not guilty admits the possession of, and ejectment by, the defendant, and detention of the property by him, and it only puts in issue the title of the premises, the right of possession and the amount of damages to which the plaintiff is entitled. p. 397

The provisions of section 230 of Article 2 of the Public Local Laws, relating to the levy upon property to be sold for failure to pay taxes, are not complied with by delivery of the notice of the levy upon anyone other than the owner of the property. pp. 398-399

In an action of ejectment, the *bona fide* occupant of the lands is entitled to recover for improvements made by him thereon—*i. e.*, not the cost to him of the improvements, but the amount by which they enhance its value to the owner. p. 399

Under section 71 of Article 75 of the Code, the plaintiff in ejectment may recover damages for the ejectment and *mesne* profits down to the time of the termination of the case; and

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such *mesne* profits may be shown by proof of the probable rental value of the property. p. 400

Where the defendant has had the use and possession of the property, the plaintiff is entitled to recover substantial damages. p. 402

In an action of ejectment, it was a question as to the admissibility of the testimony of a witness for the plaintiff as to the rental value of the land; his evidence was that the value was \$120.00 per annum; the evidence of the defendant's witnesses was that the land was worth about \$35 per acre; the jury awarded \$28.00; it was: *Held*, that the party excepting not having been injured by the testimony, it could not present a case of reversible error. pp. 400-401

A judgment will not be reversed where it appears that the ruling objected to resulted in no injury to the party excepting. p. 401

In general, a party who has not seen a certain property for 20 years is not competent to certify as to its rental value. p. 401

The voluntary appearance of a party to a suit or proceeding must be considered as a waiver of formal notice. p. 403

Under section 37 of Article 75 of the Code, a court has authority to allow an amendment of a name in a suit when it is satisfied that the party summoned as defendant was, in fact, the party intended to be sued, and its exercise of such authority is not subject to review on appeal. p. 404

*Decided January 12th, 1916.*

Appeal from the Circuit Court for Baltimore County, (McLANE, J.), to which County the case had been removed from Anne Arundel County.

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

*George E. Disney and Elmer J. Cook* (with whom was *Henry J. Broening*, on the brief), for the appellant.

*T. Scott Offutt and Eldridge Hood Young* (with whom were *James M. Munroe and John S. Young*, on the brief), for the appellees.

THOMAS, J., delivered the opinion of the Court.

This is the second appeal in this case. It is an action of ejectment brought by the appellees in the Circuit Court for Anne Arundel County on the 21st of March, 1912, to recover a farm or parcel of land in that County and the damages sustained by them. Process was issued for *Peter Abromatis* and was returned by the sheriff, "Served upon Joseph Abromatis, the person in actual possession of the lands described in the declaration, and a copy of the declaration and copy of summons left with him on the 3rd day of April, 1912." On the 18th of December, 1912, leave was granted to the plaintiffs to amend the declaration by changing the name of the defendant, who had "been inadvertently called *Peter Abromatis*," to *Joseph Abromatis*, and the amendment was made accordingly. *Joseph Abromatis* appeared by counsel and the case was tried on the issue joined on the plea of not guilty. The plaintiffs offered in evidence several deeds for the property mentioned in the declaration, including the deeds to *Isaac Amos* of *William*, and produced evidence to show that he died intestate in Harford County, Maryland, on January 6th, 1877, seized and possessed of the property, and that the plaintiffs were his only heirs at law. The defendant then offered in evidence the record of proceedings in a tax sale of the property, made in 1892, for the purpose of collecting taxes levied in 1890, and the several deeds under which the defendant claimed from the purchaser at that sale. This evidence was objected to by the plaintiffs and was admitted by the Court subject to exceptions. The

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plaintiffs subsequently filed a motion to strike out the evidence, but the Court overruled the motion. The plaintiffs excepted to that ruling, and the judgment being in favor of the defendant they appealed. This Court held in *Amos v. Abromatis*, 122 Md. 256, that the tax sale was void, and that the motion to strike out the evidence should have been granted, and the judgment was reversed and case remanded for a new trial.

The case was subsequently removed to Baltimore County for trial, and on the 3rd of February, 1915, the plea of not guilty was withdrawn by leave of the Court, and the defendant filed a motion to strike out the return made by the sheriff of Anne Arundel County of the summons issued for the defendant. This motion having been overruled, the defendant filed a motion to rescind the order of the Circuit Court for Anne Arundel County granting the plaintiffs leave to amend their declaration. The Court sustained a demurrer to this motion, and the defendant then filed a plea of not guilty, and the case went to trial again on the issue joined on that plea. During the trial the defendant reserved nineteen exceptions to the ruling of the Court on the evidence and the prayers, and has brought this appeal from a judgment on the verdict in favor of the plaintiffs for the property described in the declaration and three hundred dollars damages.

The plea of not guilty admitted the possession and ejectment by the defendant, and only put in issue the title to the premises, the right of possession and the amount of damages to which the plaintiffs were entitled. Code, Article 75, section 71; 1 *Poe*, secs. 275 and 630; *Gibbs v. Didier*, 125 Md. 486; *Wallis v. Wilkinson*, 73 Md. 131; *Brooke v. Gregg*, 89 Md. 236.

By agreement of counsel the deeds by which Isaac Amos of William acquired title were omitted from the record, and his title to the property is admitted, and the evidence offered to show that Isaac Amos of William died intestate and that the plaintiffs are his only heirs at law is not contradicted,

so that the exceptions we are to consider are important only in so far as they relate to the questions of the defendant's title and the amount of damages recoverable by the plaintiffs.

The second, third, sixth, ninth, tenth, eleventh, fourteenth, fifteenth and sixteenth exceptions are to the rulings of the lower Court excluding the record of proceedings in the tax sale of the property referred to in the first appeal; the deeds from the purchaser at that sale and the successive owners of the land claiming through him, and evidence offered for the purpose of showing that Frank Fisher, to whom the tax bills and notice referred to in section 229 of Article 2 of the Code of Public Local Laws of Anne Arundel County was delivered as "*tenant*," was in fact the *agent* of the plaintiffs.

As we understand these exceptions and rulings of the Court, the deed to Peter Abromatis, executed on the 19th of August, 1904, the date of the alleged ejectment of the plaintiffs by the defendant, and the deed from his heirs at law to the defendant were admitted by the Court for the purpose of showing that the possession of the defendant was *bona fide*, and that he was therefore entitled to be allowed for any permanent improvements on the property made in good faith. *Tongue v. Nutwell*, 31 Md. 302. Under the rulings of this Court on the former appeal the evidence embraced in these exceptions was clearly inadmissible for the purpose of establishing title in the defendant. Assuming, without deciding, that notwithstanding the previous decision of this Court and the statement in the report of sale of the treasurer that the tax bill, &c., referred to in section 229 of the Code of Local Laws was delivered to Frank Fisher, "*tenant*," it was permissible for the defendant to show that Frank Fisher was in fact the *agent* of the plaintiffs, the fact of such agency would not cure the defect in those proceedings. As pointed out in the opinion of this Court, section 230 of Article 2 of the Code of Public Local Laws, referred to provided that notice of the *levy*, &c., should be delivered to the *owner*, or at his residence, or mailed to him, or con-

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spicuously posted on the premises, whereas the report of sale shows that the notice of the levy, &c., was delivered to Frank Fisher, and we said: "Section 230 does not authorize the delivery of the notice therein referred to to any one except the owner of the property," and that there was not a substantial compliance with either section 229 or 230 of the law.

The seventeenth exception is to the action of the Court striking out the testimony of the defendant offered for the purpose of showing that he had made improvements on the land. When asked if he had made any improvements he said he had some bushes and stumps moved in 1912. This evidence was objected to by the plaintiffs and admitted by the Court subject to exception. The defendant was further asked to state what amount he expended for "cleaning up the stumps and removing the bushes," whereupon the plaintiffs objected and the Court ruled that the evidence offered was not sufficient to support a claim for improvements, and granted the motion to strike it out. The *narr.* alleged that the defendant ejected the plaintiffs in August, 1904, and the plaintiffs had offered evidence tending to show that the farm contained from forty to sixty acres of cleared or tillable land, and that the reasonable rental value of the cleared land during the succeeding years was about three dollars per acre a year. The defendant's witnesses had stated that about fifty or sixty acres of the land was cleared and tillable, and that its rental value was from thirty-five to sixty dollars a year. These estimates were based upon the condition of the land as testified to by the witnesses, and none of them had reference to the rental value as enhanced by the improvements testified to by the defendant as having been made by him in 1912. It is stated in 22 *Cyc.* 26: "In the absence of a statute to the contrary, the general rule is that the amount which a *bona fide* occupant of lands is entitled to recover for improvements made thereon is not the cost of the improvements to him, but the amount which they enhance the value of the property to the owner," and this is the rule

recognized in this State. *Jones v. Jones*, 4 Gill, 87; *McLaughlin v. Barnum*, 31 Md. 425; *Long v. Long*, 62 Md. 33. See also 15 *Cyc.* 222. Where however the rental value has reference to the improved value a different rule applies. *Jones v. Jones*, *supra*. Without further evidence of the character and extent of the improvements claimed and the extent to which it enhanced the value of the property, the evidence referred to was properly excluded.

The first, seventh and eighth exceptions are to the admission of evidence offered by the plaintiffs to show the rental value of the property on the ground that the witnesses were not qualified to testify. Under section 71 of Article 75 of the Code, the plaintiff in an action of ejectment may recover damages for the ejectment and *mesne* profits down to the time of the termination of the case, and these *mesne* profits may be shown by proof of the probable rental value of the property. *West v. Hughes*, 1 H. & J. 574; *Jones v. Jones*, *supra*; *Tongue v. Nutwell*, *supra*; *Tome Institute v. Crothers*, 87 Md. 588; *Worthington v. Hiss*, 70 Md. 172. The ejectment alleged in the declaration and admitted by the plea was on the 19th of August, 1904, and the trial of the case was not concluded until the 9th of February, 1915. The verdict was for \$300.00 damages, so that the jury only allowed the plaintiffs about \$28.00 a year for the loss of the use of the property during the years they were deprived of the possession. According to the plaintiffs' witnesses the rental value of the property was from one hundred and twenty to one hundred and eighty dollars a year, while the lowest value given by the defendant's witnesses was thirty-five dollars a year, and the defendant testified that in 1912 he received ninety dollars rent for thirty acres of the land. There is no exception to the testimony of H. E. Haslup, one of the plaintiffs' witnesses, who stated that the rental value of forty acres of the land was three dollars an acre or one hundred and twenty dollars a year. Under this state of the record it would seem reasonably clear that the defendant was not

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injured by the evidence objected to, even if we assume that it was not admissible for the reason stated, and it would work a great hardship upon the parties to reverse the judgment for such an error and subject them to the costs and expense of another trial.

There was no error in the exclusion of the evidence referred to in the twelfth and fifteenth exceptions. The witness had not seen the property since 1892, and was not shown to be competent to testify to the rental value of the property during the years from 1904 to the time of the trial.

The fourth, fifth and eighth exceptions were abandoned by the appellant.

The remaining exception is to the granting of the plaintiffs' prayers and the rejection of the defendant's. The objection to the plaintiffs' third prayer is waived by the agreement of counsel, and no objection is urged in this Court to part C of plaintiffs' first prayer or plaintiffs' second prayer, and the latter was approved in *Wallis v. Wilkinson, supra*.

Plaintiffs' fourth prayer is as follows: "If the jury find their verdict for the plaintiffs for the land mentioned in the declaration then the plaintiffs are entitled to recover as damages what the jury may find from the evidence was the fair or reasonable rental value of the land for the time the jury may find from the evidence the defendant has been in possession of said land, not going back of the 20th of August, 1904, less such amount as the jury may find from the evidence was expended by the defendant in taxes on said land after he took possession of the same."

The appellant contends that the evidence offered by the defendant shows that he did not take possession of the property until 1911, and the objection urged to this prayer is that it permitted the jury to allow the plaintiffs the rental value of the property from 1904 while limiting the allowance to the defendant for taxes to the amount expended by him after he took possession of the property. This prayer contains practically the same instruction asked for in the defendant's second and fourth prayers, and the latter was rejected

by the Court because it was covered by the plaintiffs' fourth prayer. The plea of not guilty admitted, as we have said, the ejectment of the plaintiffs *by the defendant as alleged in the declaration*, and only put in issue the title, right of possession and amount of damages plaintiffs were entitled to recover by reason of such ejectment and "detention" of the property. Under that plea the plaintiffs were entitled to *mesne* profits from the date of the admitted ejectment by the defendant to the determination of the case, there being no evidence to show that the plaintiffs had possession of any part of the property during that interval, and we think the prayer, when construed in the light of the admission of the plea, instructed the jury that they could allow the defendant for taxes paid during that time. But apart from that, there is no evidence in the case to show who paid the taxes on the property from 1904 to the date of the verdict, except the taxes for the years 1911 and 1912, which were paid by the defendant. The defendant could not therefore have been injured by the granting of the plaintiffs' fourth or the rejection of his second and fourth prayers.

The exception to the rejection of the defendant's first prayer, which sought to withdraw the case from the jury, was not pressed in this Court, and the ruling was obviously correct. The defendant's third prayer, by which the defendant asked that the jury be instructed that they could, "in their discretion," allow the plaintiffs only nominal damages, was properly refused. The defendant having had the use and possession of the property the plaintiffs were entitled to recover substantial damages. *B. & O. R. R. Co. v. Boyd*, 67 Md. 32.

The appellant insists as a further ground for the reversal of the judgment that the Court below erred in refusing to strike out the return of the Sheriff of Anne Arundel County of the process for the defendant, and in sustaining the demurrer to the defendant's motion to rescind the order of the Circuit Court for Anne Arundel County granting the plain-

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tiffs leave to amend the declaration by changing the name of the defendant from Peter Abromatis to Joseph Abromatis. Assuming that these rulings of the *Circuit Court for Baltimore County* are properly presented by the record and that they are subject to review by this Court, it is apparent that they afford no ground for the reversal of the judgment in this case.

The reasons assigned for the first motion are (1) that Joseph Abromatis was not in actual possession of the land at the time; (2) that the defendant was a resident of Howard County and that the process was served on him at his home in said county, and (3) that the suit was brought against Peter Abromatis, and that the Sheriff exceeded his authority in serving the process on the defendant at his home in Howard County, who was not in actual possession of the property. The obvious answer to these objections is that the defendant appeared, and without making any objection to the service of process, filed the plea of not guilty, thereby waiving all objections to the service of the summons and admitting the ejectment alleged in the declaration. In *Belt v. Blackburn*, 28 Md. 227, the Court said: "The voluntary appearance of a party to a suit or proceeding, must be considered as a waiver of formal notice," and in the case of *Ireton v. Baltimore*, 61 Md. 432, the Court held that after an appearance it is too late to object to any infirmity in respect to the service of the writ or summons, except where the appearance is made for the special purpose of raising the objection. The reason for the rule is strikingly applicable to a case like this where objections to the service of process are not made until the second trial of the case.

The ground of the second motion is that the amendment of the declaration made "an entirely new party defendant," and the answer to this objection is that no exception was taken to the action of the Court granting the plaintiffs' leave to amend the declaration, and that there is no appeal from such an order where the amendment is authorized by statute.

The motion of the plaintiffs for leave to amend the declaration recited that the defendant had been "inadvertently called *Peter Abromatis*," and section 37, Article 75 of the Code provides that "No writ or action shall abate because of the misnomer of any plaintiff or defendant named therein, but the Court, on suggestion, supported by the affidavit of the plaintiff or defendant or other proof to the satisfaction of the Court that by mistake the plaintiff has sued in a wrong name, or that the party summoned in virtue of said writ or action is, in fact, the party intended to be sued by such writ, or in such action, may at any time before judgment, direct the writ or any of the proceedings to be amended by inserting therein the true name of any plaintiff or defendant, at the discretion of the Court." In the case of *Union Bank v. Tillard*, 26 Md. 446, this section was held to apply to a misnomer of an individual defendant, and in *W. Union Tel. Co. v. State, etc.*, 82 Md. 306, the amendment was allowed upon the statement of counsel for plaintiffs in open Court. The Circuit Court for Anne Arundel County was authorized to allow the amendment upon being satisfied that the party summoned as defendant was in fact the party intended to be sued, and leave granted in pursuance of that authority is not subject to review by this Court. *Scarlett v. Academy of Music*, 43 Md. 203.

Finding no reversible error in the rulings of the Court below the judgment will be affirmed.

*Judgment affirmed, with costs.*

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Syllabus.

STATE OF MARYLAND,  
USE OF CARRIE V. CULLER, WIDOW OF MORRIS W. CULLER,  
DECEASED, USE OF WALTER J. CULLER, ET AL.,

vs.

STANDARD OIL COMPANY,  
A BODY CORPORATE.

*Death by negligence: burden of proof.*

The uncontradicted evidence showed that a decedent, an adult, had been properly instructed (by his employer) how to run the employer's freight elevator, which was of standard make and in good working order, and showed that the decedent had used it a number of times, and had stated, "that he thoroughly understood the operation of it"; he was found one day killed, in the elevator, which had dropped; no one saw the accident, and there was no evidence, direct or otherwise, as to its cause, or as to how it was produced: *Held*, that a prayer withdrawing the case from the jury was correct.

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A party charging negligence as the ground of action must prove it.

p. 411

Juries can not be allowed to make mere conjectures or speculations the foundation of their verdicts.

p. 411

If there be no evidence upon which a rational conclusion may be based in support of the claim of the plaintiff, the case should be withdrawn from the jury.

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*Decided January 12th, 1916.*

Appeal from the Circuit Court for Allegany County, (HENDERSON, J.), to which county the case had been removed from the Circuit Court for Washington County.

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE. BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

*Frank G. Waggaman* (with whom was *J. Lloyd Harshman* and *Albert A. Doub*, on the brief), for the appellants.

*Benjamin A. Richmond* and *Henry H. Keedy, Jr.* (with whom were *Chas. A. Little* and *Walter C. Capper*, on the brief), for the appellee.

BRISCOE, J., delivered the opinion of the Court.

This was an action instituted in the Circuit Court for Washington County, but removed to Allegany County for trial. The suit was brought by the State, for the use of the wife and children of Morris W. Culler, an employee of the defendant, who was killed on the 14th of April, 1913, while in charge of and operating an elevator, in use at the warehouse of the defendant at its plant in Hagerstown, Maryland.

The declaration contains ten counts, and each one avers that the death of Culler was caused by the alleged negligence, want of care and default of the defendant, and without neglect or fault of the deceased.

The defendant is a body corporate and owns a large three-story warehouse in Hagerstown used for the purpose of storing and delivering therefrom coal oil, gasoline and other petroleum products, in the business in which it was engaged.

The deceased was at the time of the accident which caused his death an employee of the defendant, and was in charge of a freight elevator called a Bates Hand-Power Elevator, which was used and operated for the purpose of transferring barrels of oil from one floor or story of the warehouse to another. He was engaged on the morning of the accident in transferring barrels of oil from the third to the first floor and in taking empty barrels to the second or the third floor. No one saw the accident and the only person in the building at the time was the superintendent of the warehouse, who was in his office on the first floor. He heard the elevator fall, and on reaching the elevator, found Culler dead, lying in the elevator with his face to the south, toward the front door of

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the elevator and his back against the barrel of oil. The elevator floor was broken near the platform and the cable was off the wheel at the top of the elevator.

At the trial of the case there were three exceptions reserved to the rulings of the Court. The first and second relate to its rulings upon testimony, and the third to the granting of the defendant's prayer, at the conclusion of the plaintiff's testimony, withdrawing the case from the consideration of the jury, and directing a verdict for the defendant.

From a judgment, on the verdict, in favor of the defendant, for costs, this appeal has been taken.

There was clearly no error in the ruling of the Court, in permitting the question to be asked and answered, as set out in the first exception. The witness Poole, the superintendent of the defendant company, was called as a witness for the plaintiff. He testified he had given the deceased certain instructions as to operating the elevator. He was then asked, upon cross-examination, to state what those instructions were. The question was entirely proper, upon cross-examination and the Court committed no error in permitting the question to be asked and admitting the evidence, under the answer, to the question, as propounded.

The second and third exceptions practically present the same and the controlling question in the case, and that is, whether the Court was right in granting the defendant's first prayer, which instructed the jury that under the pleadings in the case, there was no evidence legally sufficient to entitle the plaintiff to recover and the verdict must be for the defendant.

In this case the declaration contains ten counts. The first, and the other counts, except the second, eighth, ninth and tenth as stated by the appellee in his brief, charge as the basis of the suit that the death of Culler, was caused by the negligence of the appellee in not providing a safe and proper elevator with which to work; that it did not furnish him with safe appliances and machinery by which the elevator was controlled; that the elevator was negligently and carelessly

constructed; that it was equipped with a dangerous appliance for control; that it was equipped with unsafe and insufficient counter-weights, and that it was not equipped with extra safety devices for control of speed. The second count charges that the appellee did not furnish necessary co-employees to assist the deceased in operating the elevator. The eighth count charges that the appellee did not sufficiently warn and instruct the deceased as to the dangers in operating the elevator. The ninth count charges that the appellee misled and deceived the deceased as to the character and safety of the elevator, and the tenth count charges that the appellee gave the deceased wrong advice as to how to operate the elevator, and as to how to put on the brakes on the brake wheel or release the same.

An examination of the record, in this case, will show an entire absence of proof as to how the accident happened or what caused it. There were a number of theories and prof-fers made, in the course of the trial, but there was no evidence whatever to support or sustain them. No one saw the accident and there is no evidence directly or otherwise as to what caused the accident or what produced it.

The witness Poole, the superintendent of the appellee, testified, that he employed the deceased for general work around the plant. He went to work on the 3rd day of April, 1913, and he had been engaged at work there eleven days. He was killed about 8 o'clock in the morning. He testified as follows: "I found him on the elevator with one barrel of oil; the elevator was down on the lower floor; there are practically three floors in the building; the first floor is on the ground; I heard the noise of the elevator coming down and knew it was an unusual noise and went out and found him; I knew the elevator was running away or falling, it was an unusual speed; the first thing Mr. Culler did the morning of the accident was to open the office and sweep it out; the next thing he did was to bring two turns of oil down of two barrels each; he emptied the barrels of oil into five gallon special cans and after that he came into the office and asked

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what he should do, and I told him to go upstairs and bring more oil down, and he said all right and started out; I heard the unusual noise of the elevator about four or five minutes after I told him to bring more oil down; I was in the office at the time, which is about 50 or 60 feet away from the elevator; the elevator is located on the east side of the building, the office is in the northeast corner; you can hear the elevator go up and down as you sit in the office; I heard it go up and down that morning; after I told him to bring the oil down it was only a few minutes until I heard him walk up the steps and then the elevator went up and then I heard the crash; he was lying in the elevator with his face towards the south and his head toward the north and his back up against the barrel of oil and his face toward the front door of the approach of the elevator; the barrel of oil was lying down on the side; I think Mr. Culler was dead when I found him—he didn't make any move at all; as soon as I heard the unusual noise I hurried out of the office to the elevator; I had to walk 30 or 40 feet from the office before I could see the elevator; several of the boards of the elevator floor were bursted up on the side along the edge of the platform; the brake irons were intact on the elevator frames; the safety appliance was broken; the cable was off the wheel upstairs and the counterweight out of the top of the box."

The uncontradicted evidence shows that the deceased had been properly instructed how to operate the elevator, and had used it a number of times in bringing down barrels of oil from the third to the first floor, and had stated "that he thoroughly understood the operation of it. The elevator was a Bates Hand-Power Freight Elevator, was in good working condition and had been operated on the morning of the accident by the deceased, in transferring barrels of oil, from the several floors, and had been run by the deceased and others prior to the accident, with perfect safety, in the work for which it had been used.

There was no evidence to sustain any of the theories or charges set out in the various counts in the declaration, as

to the cause of the accident or in what manner it occurred, or to show any connection between, the cause of the accident and the failure of the defendant to perform any duty that it owed the deceased, which in any way contributed to cause the accident.

The Court below was clearly right in granting the defendant's motion, to exclude the evidence covered by the second exception.

This evidence had been admitted, in connection with certain proffers upon the part of the plaintiff, to show by proof how the accident occurred, and as there was an absence of proof in this respect, the evidence was properly excluded.

The case at bar falls within the rules of law announced by this Court in numerous cases, where theories as to the cause of the injury complained of based upon mere speculation or conjecture, is sought to take the place of affirmative proof, to fix liability upon a party charged with the commission of a wrongful act.

In *Charles v. United Rwy. Co.*, 101 Md. 187, it is said: "In the case at bar the evidence goes no further than to show that an injury was inflicted on the husband of the equitable appellant, without showing how it occurred, or that any act of the appellee caused it. To have permitted the jury under such circumstances to infer that negligence on the part of the defendant produced the injury, would have been to destroy the law as plainly laid down in the adjudged cases."

The case of *B. & O. R. R. Co. v. Savington*, 71 Md. 599, is directly in point. JUDGE ALVEY, in delivering the opinion in that case, said: "In matters of proof we are not justified in inferring from mere possibilities the existence of facts; there must be proof of the essential facts to fix liability upon a party charged with the commission of a wrongful act. And even a scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendant, will not justify the Court in submitting the case to the jury. There must be, in a case like the present, some reasonable evidence of well defined acts of negligence, as the cause of

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the injury complained of; and therefore, it is incumbent upon the plaintiff to give some affirmative evidence of the existence of such negligence before he can ask that the case be submitted to the jury. *Whart. Neg.*, sec. 421, and cases there cited. Or, as clearly stated by the Supreme Court in *Parrott v. Wells Fargo & Co.*, 15 Wall. 524, 537: 'No one is responsible for injuries resulting from unavoidable accidents whilst engaged in a lawful business. A party charging negligence as a ground of action must prove it. He must show that the defendant by his act or by his omission has violated some duty incumbent upon him, which has caused the injury complained of.' Juries cannot be allowed, however great the deference conceded to their province, to make mere conjecture or speculation the foundation of their verdicts. If there be no evidence upon which a rational conclusion may be based in support of the claim of the plaintiff, the case should be withdrawn from the jury and to do this is the preliminary duty of the Court."

The principle as settled by the cases cited, has been applied and followed in numerous other cases in this Court. *Benedict v. Potts*, 88 Md. 52; *B. & O. R. R. Co. v. Black*, 107 Md. 666; *B. & O. R. R. Co. v. Logsdon*, 101 Md. 368; *Stewart & Co. v. Harman*, 108 Md. 454; *Casparis Stone Co. v. Boncore*, 121 Md. 449.

There were other questions discussed in the argument of the case, and they have been carefully considered by us, but as the testimony offered here, in any aspect of the case, falls far short, of what is required in like cases, to entitle the plaintiff to recover, we find it unnecessary to prolong this opinion, by a review of them.

The Court below was correct in granting the defendant's prayer, at the conclusion of the plaintiff's testimony, which instructed the jury that under the pleadings, there was no evidence legally sufficient to entitle the plaintiff to recover, and the verdict must be for the defendant. The judgment of the Court below will be affirmed.

*Judgment affirmed, with costs.*

ELIZABETH W. McGRATH

vs.

CHARLES L. PETERSON.

*Section 86 of Article 75: equitable defenses at law. Contracts:  
signed unread. Fraud.*

A defense which is good at law can not be pleaded on equitable grounds. p. 413

A party who, being able to read, deliberately signs a contract without reading, or scrutinizing it, can not escape liability under it, occasioned by his own carelessness, unless his signature to the contract was occasioned by fraud or duress. p. 416

And if there is any evidence of any such fraud, etc., it is error not to submit it to the consideration of the jury. p. 418

Before a court can grant a prayer withdrawing a case from the consideration of the jury, on the ground of want of evidence, it must assume the truth of all the evidence tending to sustain the claim, or defense, as the case may be, and all inferences of fact, fairly deducible from it, and this although such evidence be contradicted in every particular by the opposing evidence. p. 414

*Decided January 12th, 1916.*

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Appeal from the Circuit Court for Somerset County.  
(STANFORD, J.)

The facts are stated in the opinion of the Court.

The cause was submitted to BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, UNER, STOCKBRIDGE and CONSTABLE, JJ.

*Gordon Tull*, on the brief for the appellant.

*Miles & Meyers*, on the brief for the appellee.

CONSTABLE, J., delivered the opinion of the Court.

This suit was instituted by the appellee to recover damages from the appellant for breach of a written contract of sale of land; and, upon the appellee recovering judgment in the amount fixed by the contract for the breach thereof, this appeal arises.

The appellant, among other pleas, filed two for defenses upon equitable grounds, and, upon demurrers to them being sustained, pleaded over by filing a plea averring that the alleged contract had been procured by the fraud of the appellant, and also filed two additional pleas for defense on equitable grounds. Demurrers again to the equitable pleas were sustained.

We are of the opinion the demurrers were properly sustained. Everything that could have been proved under the equitable pleas, could have properly been made matters of defense under the plea of fraud. This Court has recently, in passing upon section 86, Article 75 of the Code, declared that a defense which is good at law cannot be pleaded on equitable grounds; *Flack v. Barlow*, 110 Md. 159; *Robey v. State, use of Mallery*, 94 Md. 71 and *Stump v. Warfield*, 104 Md. 551.

There were four exceptions taken to the rulings of the Court, three on questions of evidence and one on the prayers. The settlement of the question of whether or not the Court was correct in granting the appellee's only prayer, presents the controlling point in the case. This prayer, in effect, was a demurrer to the appellant's evidence in support of her plea of fraud, for by it the Court instructed the jury, as a matter of law, that there was no legally sufficient evidence in the case to show that the contract sued upon had been procured by fraud, and that if they believed the appellant signed the contract their verdict must be for the appellee. Of course, in considering this prayer it is hardly necessary to remark at this day, that, before the Court can grant such an instruction, it must assume the truth of all the evidence tending to sustain the claim or defense, as the case may be, and all inferences of fact fairly deducible from it; and this though such evidence be contradicted in every particular by the opposing evidence; *Jones v. Jones*, 45 Md. 144.

The controversy arose over the attempted sale of a farm belonging to the appellee in Somerset County. The entire negotiations for the sale with the appellant were carried on through the agent of the appellee, H. D. Yates, a real estate broker, and his associate, Mr. Brisbane. The appellant was the owner of a farm which she had previously placed in the hands of Yates to sell. Mr. Brisbane first opened the negotiations with the appellant for the purchase of the Peterson, or appellee's, farm by asking the appellant to purchase it. The appellant testified she told him she would not buy it until she had sold her own place. A few days later Brisbane was back, and she and her husband both told him she would not make a contract to take the place for they were "not going to do anything to get into trouble"; meaning they were not in good health and would have to put on a mortgage unless they first got the money by a sale of her own place. A few days later Mr. Yates went to the appellant's home and tried to induce her to buy the place, but she gave him the

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same reasons she had given Brisbane. Later it appears that the appellant's daughter paid fifty dollars, without the knowledge or consent of the appellant, to Yates, for an option on the same farm; and it was testified by the daughter that the purchase was to be for herself, but she never received nor signed a contract, Yates telling her that it was her "mother he wanted." The appellant further testified in response to an inquiry as to why she signed the contract: "Because Mr. Yates—I met him on the street here one day and he told me that my daughter had been to his house and put up fifty dollars, and it was necessary for me to sign in order to save the fifty dollars, and wanted to know when I would go to his house to sign the contract." Later she went to his house and signed the contract at which time, in testifying as to what he said to her, said: "I told him I wasn't going to get into any trouble; I wasn't going to do anything to get into trouble, and he told me there wasn't any trouble or anything; it was only to show that when he sold my place, I would take that." Her place has never been sold.

The appellant further testified that the contract was not read to her and she had not read it herself and knew none of its provisions, giving as the reason that Yates said he was in a hurry and had work to do and that she trusted him because she had explained to him that she did not want to get into any trouble.

The daughter of the appellant testified as follows: "Q. Now, Mrs. Bowe, do you remember any statement that was made by Mr. Yates to Mrs. McGrath about signing a contract? A. He told her it was necessary for her to sign or I should lose the money. He told her it meant nothing except that when he sold her place she would take the Peterson place."

It appears to us that the Court below in granting the prayer of the appellee in the face of the above testimony, must have acted upon the theory that the appellant was bound by her act in signing the contract since she testified

she had signed it without reading or scrutinizing it, when admittedly she could read, and that she could not escape liability under it occasioned by her own carelessness. That such is the general rule is not open to question. The case of *Spitze v. B. & O. R. R. Co.*, 75 Md. 162, was a suit for personal injuries, and, upon the company pleading releases, the plaintiff filed a replication alleging they were obtained by the fraud of the company; but the Court below ruled the evidence legally insufficient to sustain the replication, and this Court affirmed the ruling. The evidence offered showed the plaintiff could not read English, and that the releases were not read to him; that he thought they were receipts to the relief department; but that he did not ask the man who delivered them to him what they were, and did not ask to have any explanation of them made to him. The Court said: "If he did not know what he was signing, it was his plain duty to inquire. He had no right to act as one who understood what he was doing, unless he intended to lead those with whom he was dealing to believe that he did understand the act that he did. Such evidence as that which the plaintiff has adduced cannot be treated as sufficient to strike down as fraudulent a written instrument under seal." But that very case recognizes the exception to the rule when it further said: "It would lead to startling results if a person, who executes *without coercion or undue persuasion*, a solemn release under seal, can subsequently impeach it on the ground of his own carelessness though at the very time of its execution he might, had he seen fit, have advised himself fully as to the nature and legal effect of the act he was doing." "Without coercion and undue persuasion" includes, of course, positive fraud, because the argument in the opinion was that the facts there did not show positive fraud. And in *Moore v. Putts*, 110 Md. 490, it was said through CHIEF JUDGE BOYD: "That case, however, fully recognized the well established doctrine that an instrument under seal could be impeached and set aside for fraud or duress."

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This point was raised as a question of evidence in *Wilson v. Pritchett*, 99 Md. 583, when, after saying, that the illiteracy of the party did not relieve him of the obligation to inform himself of the contents of the contract, by having some one, whose interests were not antagonistic to his own, read it to him before he signed it; and that he was estopped, by his failure to do so, from avoiding it on the ground that he was ignorant of its contents, and cited *Spriggs v. B. & O.*, *supra*, to that effect, and then said: "But that obligation on his part did not prevent him from showing that he was induced to sign it through positive fraud."

And the exception is again recognized in *Paper Bag Co. v. Carr*, 116 Md. 541, where, after reciting the general rule with authorities, Justice BURKE, speaking for the Court, said: "But this rule is always subject to the condition that no fraud, or material misrepresentation, or deception was practiced upon the party, under the influence of which he was lead to sign the contract. *Freedly v. French*, 28 N. E. Rep. 272; *Wilson v. Pritchett*, 99 Md. 583; *Russell v. Carman*, 114 Md. 25."

In 6 *Ruling Case Law* 638, Sec. 51, dealing with the stringency of the general rule, it is said: "The tendency of modern decisions appears to be toward the establishment of a more liberal rule. While there is always a sharp struggle in the courts between the desire to repress fraud upon the one hand, and on the other to discourage negligence and the opportunity and invitation to commit perjury, the rule seems to be settling down to learning all the facts, still scrutinizing closely, and even suspiciously, the claim of a party to such instrument that he had not read it. The fact is, that very thing frequently happens. If the opposite party has induced him by trickery, fraud or any kind of artifice not to read it, with the view to obtaining from him a paper which he could not otherwise have obtained, the right to prove these circumstances and thereby establish the fact that he believed he was signing an entirely different paper, and so relieve him-

self from the obligation thereof, is undoubted. In an action by one party against the other to enforce the contract, a plea of fraud may be sustained even though the defendant may have been wanting in ordinary prudence in relying on the other's representations as to the tenor or contents of the writing."

In view of these authorities, and many more to the same effect throughout the country which could be cited, we must hold that the evidence of fraud, through which the appellant claims she was induced to sign the contract, should have been submitted to the jury, and that, therefore, there was error in granting the appellee's prayer. It follows that the first prayer of the appellant, in our opinion, contained a true statement of the law of the case as applicable to the facts and should have been granted. The facts attempted to be elicited by the questions that were objected to and are the subject of the three exceptions, were fully brought out in other portions of the same witness' testimony.

*Judgment reversed and new trial awarded.  
with costs to the appellant.*

Md.]

Syllabus.

FERDINAND GOEBEL AND THERESA GOEBEL,  
His WIFE,

vs.

THE GERMAN AMERICAN INSURANCE COM-  
PANY OF PENNSYLVANIA.

*Fire insurance: subdivision of risk; original insurer; when agent for other insurers; terms of policy. Waivers by agents. Notice of vacancy.*

An application was made to a company for fire insurance to a certain amount; the company, being unwilling to underwrite the whole risk, placed four-fifths of it with other companies, it issuing its policy for one-fifth of the amount desired, and distributing the balance in four equal amounts among four other companies; this was done without the knowledge of the assured and without any consultation with him; the agent of the original company, who had secured the business, redelivered the policies, collected the premiums and attended to the renewals; it was: *Held*, that under the circumstances such original insurance company was the agent for the others. p. 427

Such agent of the original company had once received notice that the property insured was temporarily unoccupied, and had been authorized to waive the condition providing for the avoiding of liability while the property was left vacant, unless notice in advance had been given: *Held*, that such agent had implied authority to accept notice of a vacancy, and that therefore such notice given to him was constructive notice to the original company, and therefore to the other companies. pp. 425-427

An insurance company which issues a policy and collects the premiums, with actual or imputed knowledge that warranties in it are contrary to the real facts, will not be permitted to defeat recovery by the assured, on the ground that the conditions stipulated for in the policy did not in fact exist. p. 424

*Decided January 12th, 1916.*

Appeal from the Court of Common Pleas of Baltimore City. (DAWKINS, J.)

The facts are stated in the opinion of the Court.

The cause was argued before **BOYD, C. J., BRISCON, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.**

*Robert Biggs* (with whom was *John H. Dunlap*, on the brief), for the appellants.

*W. Calvin Chesnut and Raymond S. Williams*, for the appellee.

**URNER, J.**, delivered the opinion of the Court.

In July, 1913, a dwelling house belonging to the appellants, Ferdinand Goebel and wife, was totally destroyed by a fire which resulted from a stroke of lightning, and in this suit they seek to recover \$1,000.00 from the appellee, the German American Fire Insurance Company of Pennsylvania, upon a policy providing insurance to that amount against such a loss. The policy was issued on April 8, 1913, for the period of one year. It was the last renewal of six similar policies for preceding annual periods. The indemnity thus provided was part of an aggregate insurance of

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## Opinion of the Court.

\$5,000.00 on the dwelling, the remainder being represented by concurrent policies of \$1,000.00 each issued by four other companies. The whole of this insurance was issued in consequence of an application made to the German Fire Insurance Company of Baltimore. Prior to April 8, 1904, the property mentioned, and other buildings of the appellants, had been insured elsewhere, but upon the expiration of the pre-existing insurance, about that time, the business was transferred by the appellants to the company just named at the request of Mr. Klausmeyer, one of its soliciting agents. The application was for \$12,400.00 insurance on the appellants' buildings, including \$5,000.00 on the dwelling subsequently destroyed. As the Baltimore company did not care to issue its own policy for the entire risk, it placed four-fifths of the insurance with four other companies in equal amounts. The record does not give the names of the other companies which participated in the insurance during the ensuing three years, after April 8, 1904, but it appears that in 1908 one-fifth of the amount was placed with the appellee company, and its policy then issued was the predecessor, in regular annual sequence, of the one now in suit.

The appellants had nothing to do with the division of the insurance. Their sole application was to the German Fire Insurance Company of Baltimore, and the risk was distributed by that company, in the manner described, without previous notice to the appellants that it declined to contract for the whole liability, and without any consultation with them on the subject. The companies selected for participation in the insurance were those which made reciprocal allotments of business to the German Fire Insurance Company in similar situations. All of the other policies contributing to this insurance were sent to the last named company, and, with its own policy for a proportionate amount, were given to its solicitor, Mr. Klausmeyer, for delivery to the insured. The typewritten forms or riders for the policies issued by the other insurers were supplied by the German Fire Insurance Company. The premium for the whole insurance was

collected by its solicitor, and was by him paid to the president of the company, who remitted to the other companies their share of the premium, after deducting a broker's commission. At the expiration of each year of the insurance, renewal policies of the participating companies were tendered to the appellants, through the same solicitor, and were by them accepted, without a new application. In every instance the collection of the premium was made by the solicitor mentioned and was distributed in the manner we have described.

In November 1905 the insured dwelling became unoccupied, and the German Fire Insurance Company issued a vacancy permit. The following spring the house was again tenanted, and remained so until May, 1909, when it once more became vacant. On this occasion Mr. Goebel reported the vacancy to Mr. Klausmeyer, and, in pursuance of an appointment for that purpose, they visited together the office of the German Fire Insurance Company, and Mr. Klausmeyer went alone into the room of the president, and informed him that the property was unoccupied; but in view of the fact that the building was under the care of an overseer, who visited it regularly, the president said that the insurance would not be affected, and Mr. Goebel was accordingly advised by the solicitor to that effect. No vacancy permit was suggested, as being necessary, and none was then or afterwards obtained. The premium paid on the policies was one dollar per thousand less than would ordinarily have been charged for an unoccupied dwelling, like the one in question, but the appellants were not asked to pay a higher premium, and there is no proof that they knew of such a difference in the rates. The dwelling continued to be uninhabited until the time of the fire in July, 1913. When the renewal policies issued in April of that year were brought to Mr. Goebel for delivery, he reminded the solicitor that the dwelling was still unoccupied, and asked whether the policies were all right. The solicitor assured him that they would be effective. After the fire proof of loss was presented to the Ger-

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man Fire Insurance Company and was by it forwarded to the appellee.

At the time of the interview we have mentioned, in May, 1909, when the vacancy of the dwelling was reported, Mr. Koppleman was president of the German Fire Insurance Company, but during the last three years of the insurance Mr. Lauber held that position. In the course of his testimony Mr. Lauber stated that he could not say whether or not, prior to the issuance of the policy upon which this suit is brought, he knew that the house was unoccupied. It was admitted, however, by Mr. Klausmeyer that he was aware of this fact during the entire period from May, 1909, to July, 1913. Mr. Lauber testified that he acted in his capacity as president of the company in giving instructions to the office force for the preparation of the policy forms and their delivery to the companies with which part of the insurance was placed. The premiums due the participating companies were charged to Mr. Lauber, and the commissions for which they were liable for their portion of the business were retained by him individually. While stating that he acted as a broker in placing four-fifths of the insurance with the other companies, because that was the only capacity in which he could deal with them, and could receive a commission, yet he further said, in effect, that his functions as broker and as president of the company were so interwoven, in reference to such transactions, that they could hardly be distinguished.

Recovery upon the policy now in suit is resisted by the appellee company upon the ground that it had no actual or imputable notice of the vacancy of the dwelling, and that it is, therefore, absolved from any liability, in view of the express warranty in the policy that, during its continuance, the house should be occupied by a family, and the stipulation that the policy should become void if a building therein described, whether intended for occupancy by owner or tenant, should be or become vacant or unoccupied and so remain for ten days. This theory was adopted by the trial Court,

and it accordingly, at the instance of the defendant, granted an instruction withdrawing the case from the jury.

Upon the facts to which we have referred there can be no serious question as to the nature of the relationship between the German Fire Insurance Company and the defendant company with respect to the contract of insurance under consideration. The defendant, of course, must have thoroughly understood that its share of the business was not brought to it by direction of the plaintiffs, but was received solely because of its system of reciprocity with the German Fire Insurance Company. It was through that company alone that the defendant acted during the whole course of the transaction, including the preparation of the policy forms, the delivery of the policies, the collection of the premiums and the receipt of the proof of loss. It is not often that a representation of interest is more complete or more fully recognized. Whatever may have been the theoretical basis upon which the president of the German Fire Insurance Company sustained the character of broker in placing the insurance, the practical relation between the two companies was undoubtedly that of principal and agent in reference to the contract of insurance which is here sought to be enforced.

This being the legal relationship of the companies, the question is whether the defendant company, after issuing its policies and accepting premiums, during several annual periods, for insurance on a building which was in fact all the while vacant, should be held to be unaffected by notice of that condition which may be found to have been received by the company through which it was contracting.

It is a just and settled rule that an insurance company which issues a policy, and collects the premium thereon, with actual or imputed knowledge that warranties contained in it are contrary to the real facts, will not be permitted to defeat recovery by the insured on the ground that the conditions thus stipulated did not exist. *Harford Fire Ins. Co. v. Keating*, 86 Md. 130; *Dulany v. Fidelity & Casualty Co.*, 106 Md. 34. It was held in the cases just cited that pro-

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## Opinion of the Court.

visions, like the one in the present policy, that no officer, agent or representative of the company shall have power to waive any stipulation of the policy, except by agreement endorsed thereon, do not apply to the inception of the contract, but are intended to prevent agents from modifying its terms after it has gone into effect. In *American Fire Ins. Co. v. Brooks*, 83 Md. 32, the Court had under consideration another provision, also contained in the policy before us, that, in any matter relating to the insurance, no person, unless duly authorized in writing, shall be deemed the agent of the company. Upon the subject of this clause the opinion said: "The purpose of the provision could not have been to take from the insurance company the power to appoint an agent by parol, and thereby in many cases to secure immunity from the consequences of its own acts. If the clause is to be so construed as that, although the company has expressly, or by acts which warrant the implication, appointed an agent, yet it shall not be responsible for the conduct of such agent while acting within the scope of his real or apparent authority, unless such appointment is in writing, then the clause is a mere trap to ensnare the unwary policy-holder and a device by which an insurance company, for its own purposes, may abrogate and repeal the fundamental principle of the law of agency."

In this case the plaintiffs had ample reason to believe that the German Fire Insurance Company was authorized to act and speak for the defendant company in regard to this insurance. As between the policy-holders who depended upon the adequacy of such authority and the defendant company which induced that dependence by the course it pursued in the transaction, it seems altogether reasonable that the latter should bear the loss covered by its policy, if the agency through which it was dealing and to which its interests were so fully committed is in fact chargeable with knowledge at the time of the issuance of the policy as to the vacancy of the dwelling intended to be insured.

In *May v. Western Assurance Co.*, 27 Fed. 260, JUSTICE BREWER had before him a case in which the defendant insurance company had issued its policy at the instance of another company to which application for a larger amount of insurance had been made and which did not care to contract for the entire risk. The defendant company was held to be bound by the knowledge possessed by the company through which it received the business as to the condition of the insured property, JUSTICE BREWER stating that in his opinion it would not be fair, from any point of view in the case, to release the defendant from liability. The same conclusion was reached upon a generally similar state of facts in *Mesterman v. Home Mutual Ins. Co.*, 5 Wash. 524.

Upon the question as to whether in this case the German Fire Insurance Company, which had entire control of the insurance issued to the plaintiffs, was possessed of knowledge as to the unoccupancy of the insured building at the time of the issuance of the pending policy, we can have no difficulty in view of the special facts we have already stated. The plaintiff, Mr. Goebel, had taken the precaution to visit the company's office, with its soliciting agent, to inform its chief executive officer of the unoccupied condition of the property, and had received from him the assurance, through the agent, that the policies would not be thereby invalidated. While the knowledge thus communicated in 1909 may possibly not be sufficient to impute a continuing notice, as to the unoccupancy of the dwelling, in subsequent policy periods, yet the recognition of the solicitor Klausmeyer as the proper medium through which the information could be received and the assurance given by the company, may be considered as reflecting upon the nature and extent of the agent's authority. The evidence plainly shows that Klausmeyer was not acting as an independent broker in negotiating the insurance, but as a soliciting agent of the German Fire Insurance Company who had been twenty-eight years in its service. The business was secured for that company through his solicitation as its representative. It was through him that all of the

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policies relating to this insurance were delivered to the plaintiffs and their premium payments were received. When the original policies were expiring it was through this agent that the company, at its own instance, provided renewal policies, and repeated the process thereafter annually for eight years. It renewed the policies on the three last occasions after the building had become and continued to be vacant, and it tendered and delivered the new contracts of insurance without requiring any information as to the condition of the premises except such as it might receive through the agent to whom the entire transaction, as between the company and the plaintiffs, was entrusted. When the agent told Mr. Goebel at the time of the delivery of the policies in 1913 that the vacancy of the house would not affect their validity, he was giving the same assurance that he had been expressly authorized to give by the president of the company at its home office four years previously when Goebel and Klausmeyer called there in reference to that specific subject. Under these circumstances the company is fairly chargeable with the knowledge acquired by its agent as to the unoccupancy of the property it was undertaking to insure, and it must, therefore, be held to have waived that condition of forfeiture.

As this Court said in *Mallette v. British Assurance Co.*, 91 Md. 484, quoting from *Alexander v. Continental Ins. Co.*, 67 Wis. 427: "The insured deals with no one but the agent. The company cannot deal with its patrons in any other way. Justice and law therefore require that the company shall be held to sanction what the agent agrees to and upon which the insured relies. To allow the company to enforce a condition or forfeiture of the policy for a neglect to do that which the agent informs the assured shall not avoid the policy, would work the greatest injustice."

In 26 *Amer. & Eng. Annotated Cases*, 850, a large number of cases are cited in support of the proposition: "An agent of the insurer whose duty it is to take or solicit applications for insurance, to forward such applications to the insurer for acceptance, to deliver the policy and to collect the

premium, has frequently been held such an agent that knowledge, as to matters affecting the risk or conditions of the policy, acquired by him while performing such duties will be imputed to the insurer."

Special reliance was placed by the defendant's counsel upon the case of *Turnbull v. Home Fire Ins. Co.*, 83 Md. 312. In that case knowledge possessed by the broker who negotiated the insurance as to the use of gasoline on the premises was held not to be chargeable to the company issuing the policy. But the broker was found to have sustained no relation of agency to the insurer, and to have been employed by the insured. The case differs, therefore, in that important particular, from the one before us on this record.

In our opinion there is legally sufficient evidence in the case to support the theory of notice and waiver upon which the plaintiffs rely, and hence we are unable to approve of the instructions to the contrary effect which the Court below granted and which form the subject of the only exception reserved at the trial.

*Judgment reversed, with costs, and new trial awarded.*

Md.]

Syllabus.

JOHN HENDERSON, JR., ET AL.,

vs.

ISAAC O. HARPER, TRUSTEE, ET AL.

*Injunctions: pleading; filing written instruments referred to in bill. Parties: non-joinder; demurrer. Laches.*

Under General Equity Rule No. 4, no order or process will be made or issued on any bill, etc., until each bill, etc., together with all the exhibits referred to as parts thereof, be actually filed with the clerk. p. 432

Where a bill in equity is filed for the purpose of charging the lands of a decedent with the payment of certain sums of money alleged to be distributable to his children as legatees under his will, which is referred to in the bill, the will of the testator is a necessary part of the bill and should be filed therewith. p. 432

The non-joinder or defense of the want of necessary parties, when apparent on the face of a bill, may be availed of by demurrer to the bill. p. 432

Equity does not countenance laches or long delays, and will refuse to interfere in favor of a party guilty of laches or unreasonable acquiescence in the assertion of stale demands. p. 433

*Decided January 12th, 1916.*

Appeal from the Circuit Court of Baltimore City. (DOB-  
LER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER and CONSTABLE, JJ.

*Wm. Edgar Byrd*, for the appellants.

*R. Howard Bland* (with a brief by *Bartlett, Poe, Claggett & Bland*, and *Harley & Whittle*), for the appellees.

BRISCOE, J., delivered the opinion of the Court.

The object of the proceedings, in this case, is to charge the estate of John Henderson, deceased, with the payment of the sum of three thousand three hundred and thirty-three dollars, alleged to be the property of his surviving children, and to which it is alleged they became entitled upon his death, as part of the proceeds of their mother's estate.

The facts as disclosed by the bill are these:

Mrs. Emaline C. Henderson, of Baltimore City, the mother of the plaintiffs, died on or about the 18th of June, 1895, intestate, but seized and possessed in fee simple of a lot of ground, improved by a three-story dwelling house, known and numbered as 1610 McCulloh St., Baltimore City.

She left surviving her, four children and her husband, John Henderson, and upon her death the property vested, under the existing law, the wife dying prior to the Act of 1898, in these children, as tenants in common subject to the life estate therein of the surviving husband.

The bill charges, that on or about September 30, 1895, the surviving husband, and the children of the mother sold the house and lot whereof she died seized and possessed to one James A. Richardson for the sum of ten thousand dollars, and by deed of the same date, conveyed the lot, in fee simple, to him, that the purchase money was delivered to the husband, who voluntarily divided it, as follows: Two-thirds thereof, to wit, six thousand six hundred and sixty-six dollars and sixty-nine cents he paid to the children and retained for his own use,

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## Opinion of the Court.

the remaining one-third thereof, with a declaration, at the time, that "he would retain this amount during his lifetime and apply the income thereof to his own use, and upon his death they, meaning the children, would be entitled to the principal."

The bill then avers that it was the belief of the husband, at the time of the sale of the property and the payment of the purchase money, that he was entitled to the use of one-third of the purchase money only for his lifetime, and that he was not aware that he was entitled to the use of the whole fund for life.

The bill further avers, that John Henderson, died on or about the 10th of January, 1914, possessed of the \$3,333 1/3, but which was intermingled with his other property, during his life, and it passed, at his death, to the trustee and executor of John Henderson, for the uses and purposes set out in his will; that while his personal estate is not sufficient in the hands of the executor to pay the amount due them, his real estate is sufficient to pay his debts, and they are entitled to have the estate charged, with the payment of the fund to which they are entitled. The prayers for relief, as set out in the bill are as follows: (1) That the estate be charged with said amount; (2) That the trustee may account for the same; (3) That the said sum may be distributed among the parties entitled thereto, and (4) The prayer for general relief.

The defendants demurred to the bill and upon hearing, the demurrers were sustained and the plaintiffs declining to amend, the bill of complaint was dismissed, with costs, by the Court below.

The bill in this case, we think, was defective in several respects, and the Court was right in sustaining the demurrer, and upon the refusal of the plaintiff to amend, in dismissing the bill.

By General Equity rule No. 4, it is provided that no order or process shall be made or issued upon any bill \* \* \*, and

other paper until each bill or petition together with all the exhibits referred to as parts thereof be actually filed with the clerk.

... It will be seen, that in this case the will of John Henderson, referred to in the ninth paragraph of the bill, is a necessary part thereof, and should have been filed with the bill. Isaac O. Harper, executor and trustee, under the will is a party defendant, and the prayers of the bill are to charge the trust estate with the payment of the claim, and requiring the trustee and executor to account in a Court of Equity for the fund in question. *Chappell v. Clark*, 92 Md. 100.

By exhibit No. two, filed with the bill, it appears that two of the children of Mrs. Henderson are married, and it is stated by the appellee that all of them are married. It is clear, that if the property in question is to be treated as real estate, they are necessary parties to the case.

The joinder of the husbands and wives would be required to bind their interest.

The non-joinder or defense of the want of necessary parties when apparent upon the face of the bill can be availed of by demurrer to the bill; *Miller's Equity*, sec. 140; *Phelps' Juridical Equity*, sec. 39.

If the fund here in question is to be treated as personality at the date of the division between the father and the children of Mrs. Henderson, the first wife, it was properly distributed between the parties in interest; Art. 93, sec. 121, *Code P. G. Laws*; *Vogel v. Turnt*, 110 Md. 200.

The contention of the appellants is, that the husband was entitled to the whole fund during his life, but he voluntarily paid to this children two-thirds thereof, in ignorance of his legal rights and retained "one-third of what he was entitled, during his life and apply the income thereof to his own use, and upon his death they would be entitled to the principal thereof."

We find but little merit in the plaintiff's contention, under the facts of this case.

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The father treated the fund here in dispute for over eighteen years as his absolute property, with the consent and acquiescence of the plaintiffs. It was not only treated by all parties as his property, but it was intermingled with his own, and passed at his death to the appellee, as executor and trustee, under his will.

The children accepted and received under the agreement with their father, the sum of \$6,666.66 on the 30th of September, 1895, and with legal interest thereon up to his death, would amount to \$13,976.38, a sum larger than they were entitled to, if they had received the whole amount, under the law, at the death of their mother.

It is not alleged that the plaintiffs were ignorant of their father's rights at the time they accepted the \$6,666.66, but are relying upon their father's ignorance of the law, to aid them in securing a larger sum.

It is well settled, that Courts of Equity do not countenance laches or long delays and refuse to interfere in favor of a party guilty of laches or unreasonable acquiescence in the assertion of stale demands, after a limited period; *Hanson v. Worthington*, 12 Md. 441; *Syester v. Brewer*, 27 Md. 319; *Wilhelm v. Caylor*, 32 Md. 151; *Warburton v. Davis*, 123 Md. 232.

We think the plaintiffs, apart from the defects of the bill have failed to make out a case to entitle them to the relief asked by the bill.

The decree appealed from will be affirmed.

*Decree affirmed, with costs.*

## THE STATE OF MARYLAND

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,  
A BODY CORPORATE.

*B. & O. R. R.: charter rights; tax exemptions; when not  
waived. Corporations: irrepealable contracts with  
State. Duty of State.*

The same degree of fair dealing which is enforced between individuals must be applicable when the parties are the State and a corporation having contractual relations with it. p. 449

The special charter of the B. & O. R. R. Co., granted by the Act of 1826, constitutes a contract between the Railroad Company and the State, and the tax exemption conferred by section 18 of the charter is not one which it is within the power of the Legislature to modify or repeal, without the assent of the Railroad Company. p. 437

To affect a charter given before the Constitution of 1851, there must be both the action of the Legislature and the assent of the corporation. pp. 444-445

The acceptance by the B. & O. R. R. Co. of the rights contained in certain ordinances of the Mayor and City Council of Baltimore, amounting to police regulations of the laying of tracks and switches, which acts were in themselves no new grant of power, but only the regulations by the City of the exercise of powers contained in the B. & O.'s original charter, is not such an acceptance of rights and privileges as to bring the B. &

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Syllabus.

O. R. R. within the amendment of the State Constitutions of 1851 and 1867, by Chapter 195 of the Acts of 1890, now known as Article 3, section 48, and which provided in substance that every corporation accepting new rights, privileges or powers should be presumed to assent to the repeal of its exemptions from taxation. pp. 438-439

In a mortgage executed by the Railroad Company, there was a covenant that the Railroad Company would discharge all "taxes and assessments, etc., lawfully imposed upon the railroad and other premises or property hereby mortgaged, etc.," provided nothing contained in the section should require the Company to pay any such tax, etc., so long as the Railroad Company in good faith contests the validity thereof, so that the priority of the indenture should be fully preserved in respect to such property. It was: *Held*, this was no surrender of the Company's right to exemption from taxation. p. 433

The statutes relating to the taxation of mortgages have no application to mortgages executed by a railroad company to a trustee to secure bonds sold to investors. p. 438

The Constitutions of 1851 and 1867 do not deny to the State all power to enter into a contract with a corporation, irrevocable in its nature. p. 447

As far as contractual obligations are concerned, the construction of the Washington Branch of the B. & O. R. R. under Chapter 158 of the Acts of 1830 and Chapter 175 of the Acts of 1832, was fully as much a contract between the State and the Railroad Company as was its original charter, and the limitations therein provided, as to the burdens to be imposed upon the corporation, are as amply protected as though contained in the original charter. p. 448

Chapter 155 of the Acts of 1878 was an Act passed for the settlement of counter claims between the State and the Baltimore & Ohio Railroad Company, based upon a sufficient consideration, and contains all the elements of a contract requisite to bring it within the protection of Article 1, section 10, of the U. S. Constitution. pp. 445-448

Such Act is an irrevocable contract, and is unaffected by Chapter 559 of the Acts of 1890, Chapter 120 of the Acts of 1896, or Chapter 712 of the Acts of 1906. p. 450

The purchase by the B. & O. R. R. Co. of the shares of stock in its Washington Branch which were owned by the State was not an exercise of any new powers or franchise rights, and did not operate as a waiver or surrender of any tax exemptions.

pp. 440-441

*Decided January 13th, 1916.*

Appeal from the Superior Court of Baltimore City. (AMBLER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

*Edgar Allan Poe, the Attorney General, and Oscar Ieser, for the appellant.*

*W. Irvine Cross and R. Marsden Smith (with whom was Hugh L. Bond, Jr., on the brief), for the appellee.*

STOCKBRIDGE, J., delivered the opinion of the Court.

This is a suit by the State of Maryland to require the Baltimore and Ohio Railroad Company to pay taxes upon its gross receipts in this State for the years from 1896 to 1908, over and above the amounts already paid, or the difference between the amount of such tax as fixed by the Act of 1878, and the rates established by the Acts of 1890, 1896 and 1906. The suit is sought to be maintained by the State by virtue of the Constitutional Amendment of 1891, which

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provided that "any corporation chartered by this State which shall accept, use, enjoy or in any wise avail itself of any rights, privileges, or advantages that may hereafter be granted or conferred by any general or special Act shall be conclusively presumed to have thereby surrendered any exemption from taxation to which it may be entitled under its Charter, and shall be thereafter subject to taxation as if no such exemption had been granted by its charter."

In defense to the action, the Railroad Company sets up the provisions of Chapter 155 of the Acts of 1878, as constituting a contract between the State and the Railroad Company, irrepealable in its nature, and under the protection of the Federal Constitution, Article 1, section 10.

It has been frequently held by this Court that the charter of the B. & O. R. R. Co. granted in 1826, constituted a contract between the Railroad Company and the State, and such a contract that the exemption from taxation conferred by section 18 of that Act was not one which it was within the power of the Legislature to repeal or modify without the assent of the Railroad Company.

There are four grounds upon which the present contention is based, three of which are readily disposed of. One of these arises from the insertion in mortgages executed by the Railroad Company of the covenant that the Railroad Company would pay and discharge all taxes, assessments and governmental charges lawfully imposed upon the lines of railroads "and other premises or property hereby mortgaged, or upon any part thereof, or upon the income and profits thereof, the lien of which would be prior to the lien thereof, so that the priority of this indenture shall be fully preserved in respect of such properties, and will also pay and discharge all taxes, assessments and governmental charges lawfully imposed upon the interest of the trustee, or of the holder of any bond or bonds secured hereby in the mortgaged premises; provided, however, that nothing contained in this section shall require the Railroad Company to pay any such tax,

assessment or charge, so long as the Railroad Company in good faith shall contest the validity thereof." The contention is that by the insertion of this covenant the Railroad Company accepted, used or availed itself of certain general or special rights or privileges, and therefore, under the Amendment to the Constitution, Article 3, section 48, previously referred to, the Railroad Company surrendered its right to exemption from taxation.

With regard to this it is only necessary to say that the point so advanced is conclusively settled by the decision in *Musgrove v. B. & O. R. R.*, 111 Md. 629, in which it was held that the Acts relating to the taxation of mortgages had no application to mortgages executed by a Railroad Company to a trustee to secure bonds sold to investors.

The second contention upon the part of the State was that by the acceptance and user of rights set forth in sundry Ordinances of the Mayor and City Council of Baltimore, there has been such acceptance of rights or privileges as to bring the B. & O. R. R. within the operation of the Amendment to the Constitution of this State. An examination of the Ordinances discloses them to have related for the most part to the laying of switches or spurs which they were expressly authorized to do under the Charter of the Company, when the power was granted to construct lateral lines. The Railroad Company, it is true, was required by the terms of its charter in laying its tracks upon the streets or public ways of Baltimore City, and to do which it was given express authority, to obtain the assent of the Mayor and City Council of Baltimore before the laying of such tracks. This was for the manifest reason that for a proper exercise of the police power, full power had been granted by the Legislature to the municipal corporation over the streets, ways and alleys within the corporate limits, and in the grant of the right for the construction of lateral lines, in order not to interfere with the power of the City of Baltimore for the proper regulation of its streets, it was necessary to place that requirement upon

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the Railroad Company. This was in the exercise of the police power of the municipal corporation. The same may be said of each and all of the other Ordinances referred to; such for example as the Ordinance granting permission to erect a shed on the lot bounded by Parkin, Pratt and Poppleton streets; for establishing the height of the Baltimore & Ohio Central Building; for the construction of a single track on South Howard street, between Dover and Camden street, and a similar one for the construction of a single track on Eutaw street between Barre and Stockholm streets. Each and all of these were only the exercise of the police power of the municipal corporation. They conferred no new privilege or right not already possessed under the original charter of the Railroad Company and, therefore, they cannot be regarded as a grant of privileges as that expression is used in the Constitutional Amendment of 1890. If it had been proposed to authorize the Railroad Company to carry on the business of mining coal, to lay an oil pipe line, or to engage for profit in different lines of business from those contemplated by the charter, an entirely different question would have been presented, but where the sole subject-matter was the exercise by the municipal corporation of the Mayor and City Council of Baltimore, of its police power in regulating the manner of exercise of rights conferred by the original charter of 1826, there can be no question but that the privilege, if indeed it was a privilege, was not such an one as was intended to be embraced, and not within the spirit of the amendment to the Constitution by Chapter 195 of the Acts of 1890.

The third ground upon which the tax exemption privilege contained in the original Act of Incorporation is claimed to have been set aside and nullified, arises out of the fact that in 1896, the State's holding of 5,500 shares of the capital stock of the Washington Branch of the B. & O. R. R. was sold to the Maryland Trust Co. and by it in turn sold and transferred to the B. & O. Railroad. The claim is that the acquisition of this stock constituted the acquirement or exer-

cise of a privilege by the Railroad Company within the terms of the Constitution. The record in the case fails to bear this out. The State was at this time anxious to dispose of its holdings of this stock. The Railroad Company was desirous of acquiring the same. There was no one to whom the stock had greater value than to the Company itself. With the State the question was, how could it realize the largest amount from the interest which it held, and it not unnaturally sought to ascertain the price which the B. & O. R. R. Co. would be willing to pay for it. Legislative action was requisite to effect any sale at all and the session of the Legislature of that year was drawing to a close. The Railroad Company did not make a direct offer to the State, but it did guarantee the State that there should be a bid for the State's holding of the stock, made by a responsible bidder, of at least \$2,500,000. If the State had deemed this amount inadequate or that a higher price could be obtained from others, it had full power to take the legislative action which may have been requisite to enable the Board of Public Works to have disposed of this stock to any outside parties. That it was not so considered by those who were the officials of the State at the time, is shown in the action which was taken, but even under the action taken, though the time was short, it was ample for outside parties to have interposed a bid larger than the \$2,500,000. What actually did happen was a bid for the stock by the Maryland Trust Co. of the sum named for the stock and it was sold at that figure. It makes no difference, so far as this case is concerned, whether the Maryland Trust Company was purchasing for its own account or whether it was acting for and on behalf of the Railroad Company. The real question is, was it a fair sale, made in a manner sanctioned by law and for an adequate price in the light of all the facts as those facts were then understood? These must be answered in the affirmative and, therefore, the sale by the State of its interest in the Washington Branch of the B. & O. R. R. Co. was not the granting of any

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privilege or right within the contemplation of the constitutional amendment provided by Chapter 195 of the Acts of 1890.

Suppose, for example, instead of the method which was adopted, the State had advertised for bids for the stock to be filed with the Board of Public Works, by a certain date, and on the date named, a number of bids had been filed which when opened disclosed that they were made by responsible bidders, and the State officials had accepted the most advantageous offer, and disposed of the stock; that the stock so acquired had been subsequently offered for sale on the stock boards of New York, Baltimore and other cities and had there been purchased by or on behalf of the Railroad Company, would anyone claim for one moment that thereby the Railroad Company had acquired a peculiar privilege which would destroy important and valuable charter rights? If not, it is impossible to see how any other or different result can flow from what was actually done.

There now remains for consideration the most important question involved in this case, and that is the Act of 1678, Chapter 155. The title of that Act was as follows:

"AN ACT to adjust and settle finally by an agreement all pending controversies between the B. & O. R. R. Co. and the State of Maryland, by subjecting the franchises and property of said company within this State to taxation for State purposes to a certain extent and by providing for the payment of certain indebtedness of the said B. & O. R. R. Co. to the said State, and for the establishment by contract or certain rates of toll and transportation for coal, lumber, pig iron, ores of all kinds and stone, transported by the said B. & O. R. R. Co. to the basins of the Chesapeake and Ohio Canal Company, at or near Cumberland and by providing on certain conditions for the release of the right of the State to any proportion of the moneys received by the said Company for the transportation of passengers on its railroad between Baltimore and Washington, otherwise than

by way of dividends upon its stock in the Washington Branch Railroad of said company."

Following the title were two preambles, the second of which was in this language:

"Whereas, It is deemed by this General Assembly to be just and proper as an equitable settlement of all controversies now pending between said company and the State, that the said company *in consideration of its release* from the said contract and in lieu of its obligation of payment thereunder, *shall agree to a modification of its contract with the State* for exemption from taxation, as provided by the eighteenth section of the Act of 1826, Chapter 123, incorporating said company, by submitting to taxation to the extent of one-half of one per centum of its gross receipts within the State as hereinafter provided."

The Act then begins as follows:

"Section 1. *Be it enacted by the General Assembly of Maryland*, That all the franchises and property of every description and gross receipts of the B. & O. R. R. Co. within the State of Maryland, shall be subject to taxation for State purposes to the extent of an annual tax of one-half of one per centum on the gross receipts of its railroad and branches within the State, including its Metropolitan Branch R. R. and from its entire Washington Branch R. R. and from all other sources within this State, but to no further or greater extent nor otherwise; and provided, the said company, in consideration of the release of its obligation to pay to the State the one-fifth of its gross receipts for the transportation of passengers over the Washington Branch of its road, as provided by the eighth section of the Act of 1832, Chapter 175, shall agree on its part in the manner and upon the terms hereinafter provided, to modify its contract for exemption from taxation as contained in the 18th section of the Act of

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1826, Chapter 123, incorporating said company, by submitting all its franchises and property of every description, and all its gross receipts within the State of Maryland to taxation for State purposes to the extent and in the manner above named, and to no further or greater extent nor otherwise, and shall also accept the provisions of this Act in the manner hereinafter provided, then no other further or greater tax or burden for State purposes shall ever hereinafter be levied or imposed by the authority of this State or by any law thereof, upon any of the franchises or property of any description or receipts whatsoever of said company; provided that nothing in this Act shall be construed as exempting any property or franchises of the said railroad company from taxation for county and municipal purposes, which by existing laws and the decisions of the Court of Appeals of this State, is now held liable to taxation; and the exemption from taxation created and provided for by the 18th section of the Act of 1826, Chapter 123, entitled 'An Act to incorporate the B. & O. R. R. Co.,' be and the same is hereby declared to be modified to the extent of substituting the tax imposed upon said company by the second section of this Act, in lieu of the tax imposed by the 8th section of the Act of 1832, Chapter 175, but to no further or greater extent, nor otherwise."

At the time of the passage of this Act, there were numerous contentions pending between the State and the B. & O. R. R. Co., and from the title it appears that it was the purpose of the Act to bring about an adjustment of all the matters in dispute at that time. The Railroad Company assented to a tax of one-half of 1% upon its gross receipts in the State of Maryland, in consideration, in part, of being relieved from a capitation tax of 25c. per passenger, payable upon persons traveling over the Washington Branch. The rate of the tax on gross receipts as fixed by this Act was identical with the rate of tax at that time imposed by law upon

the gross receipts of other similar corporations. When this Act was passed the Constitution of 1867 was in force, which like that of 1851 prohibited the granting of an irrevocable or unamendable charter. Charters granted prior to 1851 and which in their nature amounted to contracts between the State and a corporation, under the decision of the *Dartmouth College case*, remained valid and unamendable except by consent of both parties. This leads directly to the question:

Was or was not the Act of 1878 in effect a modification, tantamount to the new grant of a new charter to the B. & O. R. R. Co., accepted as such by the Railroad Company, or did the acceptance of the Act bring the original charter, or the Act of 1878 within the operation of the Constitutions of 1851 and 1867? Was or was not the Act of 1878 *ultra vires* so far as the Legislature was concerned; and has or has not the tax provision contained in the Act of 1878 been repealed in whole or in part or amended by subsequent Acts of the Legislature?

To effect a modification of the charter there were requisite both the action of the Legislature and the assent of the Railroad Company. In the General Assembly of 1876, an Act was passed, Chapter 229, by which the tax exemption on the property of the Railroad Company or any of its branches was repealed, and it was provided that if the Railroad Company accepted that Act, it should be relieved of the capitation tax on the Washington Branch. This Act, however, was not accepted by the Railroad Company. It preferred to pay the capitation tax and retain the exemption which section 18 of its charter conferred. This was but two years prior to the Act of 1878. The Legislature must have known in passing the Act of 1878 that the Railroad Company had declined to accept the provision which had been proposed to be made by the Act of 1876, and while not so expressed, either in the title or in the body of the Act of 1878, it is perfectly apparent that this Act was intended to cover not merely what was cov-

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ered in the Act of 1876, but a large number of other matters as well. It was an Act supported by a large and valuable consideration, and the first question of importance is: Is it to be regarded in the light of a statutory enactment and thus subject to the power of repeal, modification or amendment, by a subsequent Legislature; or is it to be considered in the light of a contract between the State and the Railroad Company, and, as such contract, within the protection of the provision of the Federal Constitution, Article 1, section 10?

In *New Jersey v. Yard*, 95 U. S. 104, JUSTICE MILLER, in delivering the opinion in that case, uses the following language:

"It has become the established law of this Court that a legislative enactment in the ordinary form of a statute may contain provisions which when accepted as the basis of action by individuals or corporations become contracts between them and the State within the protection of the clause of the Federal Constitution \* \* \* . The Legislature may be supposed to exercise its power of regulating the burdens which are to be borne for the public service. In this case it could have modified from time to time as the legislative discretion might determine, or it might be a contract founded on a fair consideration from the party concerned to the State, and which in that case would be beyond the power of the State to impair."

So in the present case there was a well understood subject-matter of contract. There was no grant of any new right by the State to the Railroad Company, though there was a relinquishment of an existing right in return for which the State acquired a valuable right not theretofore possessed.

The Act contemplated a settlement of counter claims between the State and the Railroad Company arising out of a number of different contentions. Can it be believed that it was intended by either party, the Railroad Company or the State, that one was to be bound forever and the other only for a day? Does anyone suppose that the Act of 1878 would have been accepted by the Railroad Company and acted upon

and the payment made to the State provided for in it, and that the State had an option at any time thereafter to say that it was bound or not, according as some subsequent Legislature might determine?

The State has relied, to a large extent, upon the decisions of this Court in the cases of *Northern Central Ry. Co.*, in 44 Md. 131 and 90 Md. 447. The two cases, however, are radically different from the one now presented to the Court. The Northern Central Ry. Co. in 1880 procured the passage of an Act for which the Act of 1878 was the model, and this was subsequently asserted by the State to be within the power of succeeding Legislatures to alter, amend or repeal. That view was adopted both by this Court and by the Supreme Court of the United States, *N. C. Ry. Co. v. State of Md.*, 187 U. S. 258, but in the opinions filed by JUDGE SCHMUCKER and JUSTICE WHITE, the conclusion reached resulted from the fact that the Northern Central Ry. Co. acquired its rights and immunities of taxation from the Acts of 1854, Chapter 250, or after the adoption of the Constitution of 1851, and therefore, these immunities then granted were a subject-matter over which the Legislature had full power reserved to it to alter or amend.

In the present case the immunity from taxation arose from the Act of 1826, which was beyond the power of the Legislature to alter, amend or repeal, except by the assent of the B. & O. R. R. Co. The Act of 1878 granted no additional immunity to the Railroad Company above that contained in its original charter. On the contrary, it, to a considerable degree, abridged that right because, by the assent of the Railroad Company, it subjected the gross receipts of the Company, whether upon the Main Line or upon the Washington or Metropolitan Branches, to taxation, at a specified rate from which the Main Line would certainly have been exempt as also the Washington Branch, as will appear later, while with regard to the Metropolitan Branch, the issue was more debatable. The Constitutions of 1851 (Article 3, sec-

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tion 47) and 1867 (Article 3, section 48) cannot be given the construction that the State is without the power to *enter into a contract* irrevocable in its nature. Such a construction would make it absolutely unsafe to contract with the State upon any matter.

In the case of *Stearns v. Minnesota*, 179 U. S. 223, the Supreme Court of the United States, speaking through JUSTICE BREWER, said: "The power of amendment has its limitations or rather that an amendment may not be wholly as to the right of the State and absolutely ignoring the right of the other party to the contract, has been adjudged by this Court in *Louisville Water Co. v. Clark*, 143 U. S. 1." \* \* \* "A contractual exemption of the property of the Railroad Company in whole upon consideration of a certain payment cannot be changed by the State so as to continue the obligation in full and at the same time deny to the Company, either in whole or in part, the exemption conferred by a contract."

In the case of the *State v. B. & O. R. R. Co.*, 48 Md. 49, a suit had been brought to regulate by the State the amount of the gross receipt tax imposed by the Act of 1872, Chapter 234, and in that case it was held by the Court that if the gross receipt tax was to be regarded as a tax upon the franchise it was invalid, except with reference to the Metropolitan Branch, which it was there held had been constructed not under the original charter, but under the Acts of 1865, Chapter 70, and JUDGE ROBINSON lays down the very broad rule that the gross receipts derived from all properties held or owned under the franchises as granted subsequent to the granting of the original charter upon which no exemption was engrafted were liable to taxation under the provisions of the Act of 1872. This suggestion leads to a consideration of a portion of the argument submitted to us by the *Attorney General* to the effect that the Act of 1878 might be divisible in its operation and that the State would be limited so far as the taxation of the Main Line was concerned to the one-half of 1%, but not so limited with regard to the Washington or

Metropolitan Branches. These two Branches do not stand in exactly the same position. The Washington Branch was constructed under the authority of Acts of the Legislature of 1830, Chapter 158, 1831, Chapter 330, and 1832, Chapter 175, from which it appears that the State was directly interested in the construction of that Branch, and that in consideration of its construction by the Railroad Company the State undertook to further the construction by a liberal subscription to a separate stock to be issued for the building of that Branch of the road. So far as the contractual elements are concerned the construction of the Washington Branch was fully as much a contract between the State and Railroad Company as was the original charter. The State provided a portion of the capital, was to receive a capitation tax upon each passenger carried, while the Railroad Company was to do the actual construction work and the operation of it after construction. Every possible consideration which sustained the charter of the B. & O. R. R. Co. as a contract between the State of Maryland and the corporation, obtains with even greater force in relation to the Washington Branch. This Branch was constructed and was operated by the Railroad Company in accordance with its undertaking and the capitation tax was paid down to 1878.

The Metropolitan Branch, while it might perhaps have been constructed as a lateral, under the terms of the original charter, has already been held by this Court to have been constructed under a franchise granted in 1865.

Therefore, it follows that the present contention of the State could not be maintained as far as the Washington Branch is concerned, even if sound with respect to the Metropolitan Branch. But can that Branch be segregated so as to make an increased rate of taxation on gross receipts provided by the Acts of 1890, 1896 and 1906 apply, or is the Act of 1878 indivisible and does it constitute a contract in which one part is interdependent upon the others, so that it must be sustained in its entirety, if sustained at all? An

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examination of the Act of 1878 clearly discloses that its object and purpose was to reach a final adjustment of matters in dispute between the State and the Railroad, not an adjustment of some and a leaving of others open and subject to future unknown modifications. If it be assumed that the gross receipts of the Metropolitan Branch were liable to taxation under the Act of 1872, and any subsequent alterations or modifications thereof, while the gross receipts of the Main Line and the Washington Branch were not so subject to taxation, is it to be supposed that the Railroad Company would have assented to the taxation of the exempt portions of the line, and still leave the Metropolitan Branch liable to any rate of taxation that any subsequent Legislature might impose?

Is it not more compatible with the terms of the Act of 1878 to read it as meaning, that in consideration of a rate of taxation on gross receipts established by that Act for the Metropolitan Branch, which should not thereafter be subject to modification, the assent was given to subject to taxation receipts of the Railroad Company which were then exempt?

The same rule of fair dealing which is enforced between individuals must be applicable where the parties are the State and a corporation having contractual relations with the State. The State can no more retain the benefits derived from its agreement and repudiate the benefits which are derived or to be derived by the other party to the contract, than can the individual.

The Railroad Company submitted tables of figures designed to show that under the agreement the State had received more than it would have done if taxes had been paid upon the gross receipts under the Acts of 1872, 1890, 1896 and 1906, upon such portions of the line as could properly have been subjected to such taxation, and retained its exemption upon so much as was exempted by its charter.

We are not now concerned with the question whether the State has received more or has received less than it would

have received if the Act of 1878 had never been passed, but whether that Act was one within the power of the State to pass, and, if so, then what are the legal rights of the parties. And from the considerations set out in this opinion, it follows that the Act of 1878 was not *ultra vires*, but was within the power of the State to adopt; that when adopted, assented to and acted upon by the Railroad Company in strict accordance with its terms, it became an irrevocable contract, and was therefore unaffected by the Acts of 1890, Chapter 559; 1896, Chapter 120, and 1906, Chapter 712; that the consideration for the contract was a sufficient consideration to support it, and that it contains all the elements requisite to bring it within the protection of the Constitution of the United States, Article 1, section 10.

In view of the conclusions reached upon the several issues presented in this case, it is not deemed necessary to discuss the various prayers in detail, since they embody no prejudicial and therefore no reversible error, and the judgment of the Superior Court of Baltimore City will be affirmed.

*Judgment affirmed.*

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Syllabus.

GUSTAVIA NIHISER

vs.

WINTON M. NIHISER.

*Husband and wife: creditor relation; property purchased with wife's money; no promise of repayment; mortgage of property to secure debt of wife; repayment; Principal and surety.*

If, with the knowledge and acquiescence of the wife, her money is used to purchase property and the title thereto is taken in the name of the husband, she can not claim as creditor of the husband, in the absence of an express promise of the husband at the time to repay to her. pp. 455-456

When property is pledged or mortgaged by the owner to secure the debt of another person, such property occupies the position of a surety. p. 459

The implied obligation of the principal to indemnify his surety springs up at the time the relation is entered into, and is consummated when the surety has paid the debt, but the principal can show that he has reimbursed his surety. p. 459

Evidence is always admissible to show the equitable rights of the principal and surety toward each other, if material to the right to recover the amount paid by the surety; and as between the immediate parties, to show their true relation in fact, although different from that indicated by the instrument or their relative positions thereon. p. 459

A wife, a beneficiary of a trust estate, permitted her husband to receive her income from her trustee, which was used to purchase real estate the title to which was taken in the husband's name; subsequently money was borrowed by the wife from her trust estate, the loan being secured by a mortgage on the property, the husband continuing to receive the wife's income. Upon a foreclosure of the mortgage, the excess was claimed by the wife, holding a judgment against the husband,

and by the husband, alleging that the debt secured by the mortgage was the sole and separate debt of the wife, and that the property mortgaged was security only:

*Held*: that if the husband, while receiving the wife's income, proposed to treat the wife as his debtor, the circumstances demanded that he apply the income to the debt, or tell the wife he proposed to assert the rights of a surety if his property was sold. p. 460

*Held*: that a court of equity, in the absence of clear and satisfactory proof, that the wife did not intend her income to be applied to the payment of the debt, will not permit a husband, as surety, to hold the wife responsible, as principal; but will be regarded as reimbursed where after the creation of the relation of principal and surety, the husband receives more of her money than that for which he became surety. p. 461

*Decided January 13th, 1916.*

Appeal from the Circuit Court for Washington County.  
In Equity. (KEEDY, J.)

The cause was argued before BOYD, C. J., BRISCOE, PAT-  
TISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Louis J. Burger* and *John Hinkley* (with whom was *Albert J. Long* on the brief), for the appellant.

*Harry Brindle* (with whom was *Frank G. Wagaman* on the brief), for the appellee.

BOYD, C. J., delivered the opinion of the Court.

This is an appeal from a decretal order of the lower Court, which sustained exceptions filed by the appellee to the distribution in an auditor's account of \$721.40 to the appellant, who was a judgment creditor of the appellee, and which decreed that the appellant was indebted to the appellee in a sum equal at least to the judgment, interest and costs. They were husband and wife until 1912, when they were divorced.

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They moved from West Virginia to Keedysville, Washington County, Md., in 1887, where the appellee practised medicine. On March 24, 1887, a property situated in Keedysville was conveyed to the appellee for the consideration, as mentioned in the deed, of \$3,000. At that time Mr. John T. Morris was trustee of an estate, the income of which was payable to Mrs. Nihiser for life and the remainder was left to her children. The income seems to have amounted to about \$1,500 per annum. An agreement of counsel shows that on the date of the deed a mortgage was given for \$3,000, to secure the payment of five promissory notes of \$600 each, payable in one, two, three, four and five years. The appellant claims, and is apparently sustained, that the notes were paid with the income received from the trustee. At any rate the evidence shows that all of the income, with the exception of several sums, was paid to Dr. Nihiser from 1887 to 1901. On October 8, 1887, Mrs. Nihiser wrote to Mr. Morris as follows: "We received by B. & O. express \$171.00, amount of collections due me October 1, 1887. Will you please send checks to Dr. hereafter instead of the money, as we have opened an account with the First National Bank of Hagerstown." Although the evidence shows that Mrs. Nihiser's income was used in paying for the Keedysville property, it likewise appears that it was done with her entire consent and acquiescence, and there is nothing to show that at the times of the payments to Dr. Nihiser there was a promise on his part to repay the amounts so received.

In 1894 they moved to Baltimore but returned to Keedysville in the Spring of 1895. Mrs. Nihiser and apparently her two children, who were then seven and nine years of age respectively, greatly preferred living in Baltimore, but the Doctor was not satisfied there and they returned to Keedysville. It is claimed by the appellant that in order to satisfy her and the children in leaving Baltimore, her husband promised to build a house for her on some lots in Mountain Lake Park, Md., which she had agreed to purchase, by an agreement dated September 3, 1894. The consideration for the

lots mentioned in the agreement was \$600.00—\$100.00 of which was paid in cash, and the remainder was to be paid in two payments of \$250.00 each, on January 1st, 1895, and January 1st, 1896. The deed for the Mountain Lake Park lots was not made until November, 1903, when the lots were conveyed to Mrs. Nihiser, but in 1895, a house was erected on them. On April 2nd, 1895, Dr. and Mrs. Nihiser executed a mortgage on the Keedysville property, which stood in his name, to John T. Morris for \$2,500.00, which recited that Mr. Morris had by an order dated February 25th, 1887, been appointed trustee for the property and estate devised and bequeathed by Theodore Weems "for the sole and separate use of said Gustavia Nihiser (formerly Gustavia Weems) and Rachel Weems," that by another order passed on the 27th of March, 1895, "the said Trustee was authorized to loan and advance to said Gustavia Nihiser from the trust estate held by him for her in said cause, the sum of Twenty-five Hundred Dollars, the said loan to be for five years with privilege of renewal in the discretion of said trustee, and to be secured by a mortgage to said trustee on the hereinafter described property from the said Gustavia Nihiser and her husband, Winton M. Nihiser," and that in execution of said last mentioned order "the said John T. Morris, Trustee as aforesaid, hath loaned and advanced to the said Gustavia Nihiser the sum of twenty-five hundred dollars, being part of the trust estate aforesaid held by him for her as aforesaid, *the said loan to be returned at the end of five years from the date hereof*, and to be secured by a mortgage of the hereinafter described property in accordance with the terms of said order."

The mortgage contains the usual covenants on the part of Dr. and Mrs. Nihiser and provides that in case of default and a sale made under the power, the surplus, if any, after payment of expenses, incident to the sale and all claims of the trustee under the mortgage, shall be paid to "the said mortgagor, Winton M. Nihiser." No part of the mortgage was paid, and Louis J. Burger, who had been appointed substi-

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tuted trustee after the death of Mr. Morris, sold the property under the power of sale for \$3,475.50. After distributing to the costs, including commissions, and the principal of the mortgage, the auditor distributed to Mrs. Nihiser, in part payment of the judgment held by her, the sum of \$721.40. That was a judgment obtained by her against Dr. Nihiser for \$1,564.19, with interest and costs, on June 4, 1912, which was after they were divorced, on a note given by him to her sometime prior thereto. It was for insurance money she had received, and which her husband had borrowed from her. She filed a petition in the mortgage case asking to have the surplus above the mortgage distributed to her judgment, and the Court passed an order directing the auditor to so distribute said surplus, subject to all legal exceptions. The appellee filed exceptions to the audit, alleging that the debt secured by the promissory note and mortgage to the trustee was the sole and separate debt of Mrs. Nihiser, and that he signed and executed them solely as surety, that the property described in the mortgage and sold in those proceedings was at the time of the sale his sole property and that by reason of the facts stated Mrs. Nihiser was indebted to him in the sum of \$2,500.00, together with the costs and expenses incident to the sale. He then claimed that he was entitled to set off that sum against the judgment. Neither trustee collected any interest on the mortgage, and there seems to have been no claim for interest, either after the separation of the parties in 1909 or after the divorce.

The law in this State is too clear to admit of any question "that the wife may become a creditor of the husband, in respect of money or property belonging to her as her separate estate, which the husband has *received under an express promise at the time of repaying to her*. But if such money or other separate property of the wife has been received by the husband, with the knowledge and acquiescence of the wife, without such express promise *at the time*, no implied assumpsit, either legal or equitable, will arise to support a

claim against the husband or his estate. The wife having the *jus disponendi* of her separate property, if she thinks proper to let her husband have it, or appropriate it, without any express promise or agreement at the time to account for or repay her the amount so received or appropriated, she can not afterwards set up a claim against the husband upon the footing of a creditor. In such case she is taken to have acquiesced in the appropriation of the fund for the common benefit of herself and husband, or for the benefit of the family." *Grover & Baker Sewing Machine Co. v. Radcliff*, 63 Md. 496. See also *Farmers and Merchants Bank v. Jenkins*, 65 Md. 245; *Taylor v. Brown*, 65 Md. 366; *Jenkins v. Middleton*, 68 Md. 540; *Stockslager v. Mech Loan Inst.*, 87 Md. 232; *Downs v. Miller*, 95 Md. 602, and cases there cited in them. In *Reed v. Reed*, 109 Md. 690, it was held that when a wife purchases property with her money and causes it to be conveyed to herself and husband as tenants by the entireties, the effect of a subsequent decree of divorce is to convert it into a tenancy in common, and it does not entitle her to claim the entire ownership. In that opinion *Tyson v. Tyson*, 54 Md. 35, was referred to. There the wife who had obtained a divorce *a mensa et thoro* sought to have the Court restore to her her separate estate, which her husband had received, but after referring to some of the earlier cases in this State, which were followed in those cited above, the Court said: "If the effect of knowledge and acquiescence on the part of the wife was sufficient to destroy her right as creditor in this case, unless there was an agreement or promise of the husband to repay, it follows, necessarily, that the conversion of the money by the husband, with the wife's concurrence, and her conjoint act and deed must equally destroy her right to recover it as her separate property, after divorce, after the lapse of a series of years, without any promise or agreement of the husband to return or repay it."

It would seem, therefore, to be clear, under the authorities cited and the evidence, that the appellant can not now claim

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that the Keedysville property was hers, and the appellee could not be denied the right to assert the claim made by him, merely because the money with which that property was purchased was originally that of Mrs. Nihiser. The evidence is conclusive that it was used with her consent and acquiescence and that the husband did not *at the time* promise to repay it. Moreover, the petition of the appellant expressly alleges that Winton M. Nihiser was the owner of the equity of redemption in the real estate sold, that her judgment was the next lien to the mortgage and prayed that the surplus be applied to the payment of the judgment. There is no other prayer in the petition and the appellant's claim against this fund therein is based entirely on her judgment. The mortgage itself, to which the appellant was a party, also provides as we have seen, that in the event of a sale under the power, the surplus, if any, should be paid to Winton M. Nihiser. There can, then, be no doubt that the Keedysville property belonged to him, and any right the appellant has to the surplus must be founded on her judgment.

Coming then to the Mountain Lake Park property, the question is whether the appellee can defeat the distribution to the appellant of the surplus on the ground that *his* property was sold to pay *her* debt, and that he was merely surety for her. The recitals in the mortgage do undoubtedly show that the loan was to Mrs. Nihiser. The order of the Court authorized the trustee "to loan and advance to said Gustavia Nihiser from the trust estate held by him for her in said cause, the sum of twenty-five hundred dollars," and the mortgage recited that the trustee had, in execution of that order, "loaned and advanced" to her that sum. Notwithstanding those recitals we are of the opinion that the letter of John T. Morris to Dr. Nihiser, dated in March, 1895, in reference to the decree of the Court authorizing the loan, and some of the other evidence ruled out were admissible, but giving due weight to said testimony, as if it had been admitted, it does not materially affect the question. The house was

built for Mrs. Nihiser with her money on land which she then had an equitable interest in and subsequently had a deed for.

But conceding all that to be true, the question still is whether he is in a position to assert in a Court of Equity a claim for the amount of the mortgage against his wife. There can be no doubt that he can not for at least a part of it—such part as he used for his own purposes. The learned Judge below concluded that he had paid at least two thousand dollars of the amount for his wife, and as that was more than the judgment he did not deem it material that some of the money obtained on the mortgage did not go into the Mt. Lake Park property. While we think it was incumbent on Dr. Nihiser to prove how much of the sum received from the mortgage he paid out on account of the Mt. Lake Park property, and we are not prepared to say that the evidence shows that the \$300.00 which the lower Court included in the \$2,000.00 was paid out of that fund, it does appear that the sum of \$1,415.00 was paid to the contractor, who built the house, and several hundred dollars were invested in furniture for it, and hence we will assume that an amount equal to the judgment was paid by him out of the \$2,500.00.

As no question has been raised by the appellant with reference to the decision of the Court below, that the Act of 1914, Chapter 393, now section 12 of Article 75 of the Code, and such cases as *Smith v. Wash. Gas Light Co.*, 31 Md. 12, authorized the Court to entertain the claim of the appellee asked to be set off against the judgment, we will not discuss that; but, assuming the conclusion of that Court to be correct on that subject, we will determine the main question, whether the appellant is indebted to the appellee by reason of the sale of the Keedysville property sold under the mortgage. The theory of the appellee is that the relation of principal and surety existed between Dr. and Mrs. Nihiser for so much of the money secured by the mortgage as was used for her. The general rule is that "When property of any

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kind is pledged or mortgaged by the owner to secure the debt, default or miscarriage of another person such property occupies the position of a surety." 27 *Am. & Eng. Ency. of Law*, 433. The implied obligation of the principal to indemnify his surety springs up at the time the relation is entered into and is consummated when the surety has paid the debt, *Nally v. Long*, 56 Md. 567, and, of course, when the property is sold to pay the debt and the debt is thereby paid. But, "The principal can show in his defense that he already has reimbursed his surety," 32 *Cyc.* 269, and "The burden is upon the surety to show the relation, in an action in which his right to a particular recovery depends upon his relation as surety to another as principal. \* \* \* Evidence is always admissible to show the equitable rights of the principal and surety toward each other, and which is material to the right to recover the amount alleged to have been paid by plaintiff as surety, and as between the immediate parties, to show their true relation in fact, although different from that indicated by the instrument or their relative positions thereon." 32 *Cyc.* 269 and 270.

Keeping those familiar principles in mind, it seems to us that the established facts preclude a recovery by the appellee, and prevent his setting off this claim against the appellant's judgment. Admitting the payments to the appellee of the income of the appellant to have been so made as to conclude any question about his ownership of the Keedysville property, and admitting that the mortgage was for the most part the sole debt of the appellant, which mortgage he joined in and placed upon his property in order to secure the debt, we are not prepared to say that under the circumstances he can now hold the appellant for the amount of the mortgage applied to the Mountain Lake Park property. From April 2nd, 1895, when the mortgage was given, until some time in 1901, he collected practically all of the income of the appellant, as indeed he had been doing for eight years prior to the date of the mortgage. By reason of the exclu-

sion of some of the evidence offered, it is not definitely shown what the income amounted to, but from what we can gather from the record, and as stated in the opinion of the lower Court, it was about \$1,500.00 per annum. After the mortgage was given, the appellee thus received eight or nine thousand dollars of the appellant's money. The mortgage and note were payable five years after date and at the end of that time the trustee could, and under some circumstances it would have been his duty to demand the payment of the mortgage in order to protect the remaindermen. It is said that the mortgage could not have been paid during the first five years because it was not payable until the end of that period, but inasmuch as no interest was being paid, it can not be doubted that the trustee would have accepted payments during the five years, and even if there could be any question about that, the appellee knew it would mature April 2nd, 1900, and if he proposed to treat his wife as his debtor, the circumstances demanded of him that he should at least apply what he did receive after the maturity of the mortgage, or at least tell her that he proposed to assert the rights of a surety, if his property was ever sold under the mortgage. If that was the only reason for not paying it, he could have saved some of the income for the year 1899, which, added to that of 1900, would have enabled him to pay at least what he secured for her. Moreover, if he had then shown any inclination to apply the money to the payment of the mortgage, there is nothing to suggest that she would not have permitted him to still collect her income until it was paid. They did not separate until eight years after she stopped him from collecting it. She was disabling herself from paying the mortgage by giving all of her income to him, and he was presumably acting for her interest. She and her two children testified that she was constantly urging him to pay the mortgage off, but he did not pay one dollar of it— notwithstanding his receipt, after it was given, of so much of his wife's money. It is true she could have stopped the

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payments to him sooner, as she subsequently did in 1901, but that can not affect the question, for she may not only have been influenced by what most wives would be—a desire to avoid disagreeable consequences from asserting their rights against their husbands—but she actually let him have eight or nine thousand dollars of her money after the mortgage was given. If, then, she had or is presumed to have had knowledge of the fact that he had become surety for her, and hence was her creditor, entitled to proceed against her if his property suffered, is not her defense ample and clear, to follow the language quoted above, as she “already has reimbursed her surety”? 32 *Cyc.* 269, *supra*.

Upon what principle can it be said that the wife cannot become a creditor of her husband for her money which he has received with her consent and acquiescence, unless he at the time promises to repay it, but he can hold her responsible as her surety and is not to be regarded as reimbursed, although after the execution of the instrument which he claims created the relation of principal and surety he received more than three times as much of her money as he became surety for? A court of equity should not permit such an injustice to be done, at least unless there is clear and satisfactory proof that the wife did not intend any of the money to be applied to the payment of the mortgage or other instrument by which the husband became liable to the creditor. It is not necessary to determine how far the recent legislation in this State, beginning with the Act of 1898 and now in Article 45 of the Code, has affected the rule originally announced when the property rights of married women were very limited, but we do not hesitate to hold that a husband who has thus received sufficient of his wife's money to pay off the indebtedness for which he has become surety must be regarded as reimbursed. We mean, of course, when, as in this case, he was not required by his wife to apply it to other purposes and it was simply given to him without any specific directions as to what he was to do with it, which the appel-

lee claims was the case here. The appellant claims that she insisted upon his paying the mortgage off with this money, and of course if she is correct that is all the more reason for regarding the appellee as reimbursed.

But the evidence of Mrs. Nihiser and of her two children satisfies us that Dr. Nihiser promised to pay off the mortgage with the money thereafter received by him and, although he denies it, we think the circumstances corroborate them. It is difficult to understand how any man could receive \$1,500.00 a year of his wife's money for eight years and still intend to hold her responsible for something less than \$2,000.00 which she got the benefit of because property paid for with her money, but taken in his name, was used to secure the loan. That of itself ought to be sufficient corroboration for her, but when he does not deny that he continued for six more years to receive \$1,500.00 per annum of her money—especially as he swore he was making from \$1,200.00 to \$3,500.00 a year in his practice—and she had no way of paying the mortgage off excepting with that money, her evidence is much more probable than his. How could the mortgage be paid, if he did not pay it, when he was getting all of her income? It is true that the children who testified were very young when the mortgage was given, but they also testified to statements made at times when they were of such ages as there could be no excuse for false swearing by reason of their ages. They were either telling the truth or they were deliberately falsifying, and we have no reason to find them guilty of perjuring themselves. It becomes unnecessary to pass on the exceptions to testimony which are numerous. It is of course understood that the rights of creditors of the husband are not involved. We are of the opinion that the decretal order of the lower Court must be reversed and the audit should be ratified.

*Decretal order reversed, and cause remanded so that an order can be passed in accordance with this opinion, the costs to be paid by the appellee.*

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Syllabus.

SAFE DEPOSIT AND TRUST COMPANY OF  
BALTIMORE,  
TRUSTEE, GAERNISHEE OF CATHERINE DAVIS BURT,

vs.

INDEPENDENT BREWING ASSOCIATION,  
A CORPORATION.

*Attachment laws: "uncertain interests"; spendthrift trusts.*

The property devised in trust for a devisee is not liable to attachment, and can not be reached by his creditors by any process either at law or equity, where by the plain terms of the will, the right to the enjoyment of the income in the hands of the trustee is to the exclusion of his creditors. p. 465

While the language of the Code, section 10 of Article 9, provides that any kind of property or credits may be attached for a person's debts, it does not apply to, or cover, a contingent or uncertain interest in a trust estate. p. 468

*Decided January 13th, 1916.*

Appeal from the Superior Court of Baltimore City.  
(SOPER, C. J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, UNER, STOCKBRIDGE and CONSTABLE, JJ.

*Frank Gosnell and C. Morris Harrison* (with whom was *Robert L. Gill*, on the brief), for the appellant.

*J. Stanislaus Cook* (with whom was *Albert R. Stuart*, on the brief), for the appellee.

BRISCOE, J., delivered the opinion of the Court.

This is an attachment proceeding, issued out of the Superior Court of Baltimore City, on the 1st day of March, 1915, on a foreign judgment obtained in the District Court for the Eleventh Judicial District of the State of Minnesota by the plaintiff against the defendants and laid in the hands of the Safe Deposit and Trust Company of Baltimore, trustee, as garnishee of the defendants, Charles B. Burt and Catherine Davis Burt, his wife, non-resident debtors of the State of Maryland.

The garnishee appeared and moved to quash the attachment upon the ground that the defendants had no attachable interest in the property mentioned in the proceedings or in the hands of the garnishee, as trustee.

On the 7th of May, 1915, the attachment was dismissed by the appellee as to Charles B. Burt, but the motion as to Catherine D. Burt, the other defendant, was overruled. Thereafter, the case was tried upon the plea of *nulla bona*, and a second plea, that the income of the defendant in the trust estates in its hands as trustee, under the wills of the testator and testatrix is payable only to her during her life, after the death of her husband, who is at this time alive, and that the interest of the defendant therein is not subject to attachment.

The replication filed to these pleas asserts that the garnishee on the day of laying the attachment in its hands had to the value of the sum of \$830.19/100 in the writ of attachment specified of the goods, chattels and credits of the defendant in its hands, etc.

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The case was tried upon the pleadings, an agreed statement of facts, and certain exhibits filed therewith and from a judgment of condemnation to the extent of \$1,093.47, and costs, against the interest of the defendant in and to property held by the garnishee, as trustee, this appeal has been taken.

The questions in the case are raised upon a single exception, and that is to the refusal of the Court to grant the following prayer, offered on behalf of the garnishee and the defendant, Catherine D. Burt: "The garnishee prays the Court to rule as a matter of law that under the pleadings, the agreed statement of facts and the exhibits in this case the defendant, Catherine Davis Burt, has no attachable interest in any property, funds, goods or chattels now held by the Safe Deposit and Trust Company of Baltimore as trustee under the wills of Alfred P. Burt and Mary E. Burt, and therefore the plaintiff is not entitled to a judgment of condemnation."

The ruling on this exception presents the important question in the case, and we shall first consider whether there was error in refusing this prayer. If, as a matter of law, the defendant Catherine D. Burt, under the facts disclosed by the record, had no attachable interest in the property held by the garnishee company, then the plaintiff was clearly not entitled to a judgment of condemnation, and the prayer should have been granted and not refused.

It is conceded that the interests of Charles B. Burt under the wills of Mr. and Mrs. Burt are not liable to attachment, and can not be reached by his creditors by any process either at law or equity, because by the plain terms of both wills, the right to the enjoyment of the income in the hands of the trustee shall be to the exclusion of creditors. *Smith v. Towers*, 69 Md. 88; *Reid v. Safe Deposit Co.*, 86 Md. 467; *Brown v. Macgill*, 87 Md. 162; *Jackson Square L. & S. Assoc'n. v. Bartlett*, 95 Md. 661.

Coming, then, to the interest of Mrs. Burt, we think it is clear from the language of the will of the testator (and it

was agreed for the purposes of this case that the two wills were the same as to the interest), that the defendant, Mrs. Burt, took an equitable contingent remainder for life under both wills, and that this interest in the hands of the trustee was not subject to attachment.

By the fourth clause of the testator's will it will be seen that he left all the rest and residue of his property to the appellant company, in trust, for the uses and purposes set out therein. After the death of his wife, who is now dead, he provides as follows:

"And from and immediately after the death of my said dear wife, subject of said annuity to my sister for life as aforesaid, in trust to, \* \* \* pay into the hands of each of my sons, Charles B. Burt and Henry T. Burt, one equal fourth part of the net income derived from said trust property, or apply the same to the support, and maintenance of my said sons respectively or to the support and maintenance of themselves and their wives and children, as, in the judgment of said trustee or its officers, or its successors in trust, shall be most promotive of their best interests; but in no event shall the share of said net income so devised for the use of my said two sons, Charles and Henry and their families, be subject to the order of my said two sons, nor either of them, nor shall any assignee or grantee of theirs or either of them be entitled to demand or receive their said shares of said net income, nor shall the same at any time be subject to or liable for the payment of any debt or obligation which my said two sons, Charles and Henry, or either of them, shall at any time owe, contract or be under, or liable to attachment therefor; but the same shall be alone payable, by said trustee and its successors, to them personally and individually, or applied to the support and maintenance of themselves, their wives and children as aforesaid, in the discretion of said trustee or its successors; and from and immediately after the death of my said son, Charles, in trust to pay out of the net income of the

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portion of my estate devised in trust for my said son, Charles, one-half thereof to Catherine D. Burt, wife of my said son Charles, for and during the term of her natural life, and one-half thereof to the child, children or descendants of my said son Charles, living at the time of his death; and from and immediately after the death of said Catherine D. Burt, in trust to pay and distribute to the child, children and descendants of said Charles living at that time, if any, said one-fourth part of said whole trust property, absolutely, to be equally divided amongst them if more than one, share and share alike, the child or children of any deceased child or children of my said son Charles, to take the share or portion to which its or their parent would have been entitled to if living."

And by the will of Mrs. Burt it is provided:

"And from and immediately after the death of my son Charles B. Burt, leaving his present wife Catherine Burt, surviving him, in trust to pay one-half of the third of said income theretofore payable to my son Charles, unto his said wife, for and during her natural life, and for that purpose retain a sufficient part of said trust property.

"And subject to the above provisions for the said wife of my son Charles, during her life, from and immediately after the death of my son Charles, in trust to pay, transfer and deliver the said third part of said trust property, the income whereof is payable to or for my said son Charles for life, to his daughter, Agnes Burt, if she shall live to attain the age of twenty-one years, or to her issue, \* \* \* ."

It will be thus seen, under the plain terms of these wills, that the income did not vest in the defendant, Catherine, until the death of her husband, and then only unless she survived him. The manifest intention of the testator and testatrix was to provide for their son and his family during his

life and then for his wife after his death, if she survived him, and for his children.

The present case, therefore, falls directly within the rules of law announced by this Court in *Straus v. Rost*, 67 Md. 465; *Reilly v. Bristow*, 105 Md. 326, and the cases there cited, so a further discussion of them is not necessary.

While the language of the Code, Art. 9, sec. 10, is very broad, and provides that any kind of property or credits belonging to the defendant, in the plaintiff's own hands, or in the hands of any one else, may be attached, it has never been held, that it would apply or cover a contingent or uncertain interest in a trust estate, such as the one here in dispute.

In *Smith v. Gilbert*, 71 Conn. 149, the Supreme Court of Connecticut, held, in a somewhat similar attachment proceedings, that "an uncertain interest incapable of just appraisal and possibly of no value, could not be attached. The Court said: "When an interest which may be strictly neither goods nor land is nevertheless clearly property capable of being fairly sold and appraised, which is subject to the debtor's control, and which ought to be responsible for his debts, we say that the policy of the State for 250 years clearly indicates that such interest is attachable property within the meaning of the statutes. But the same reasoning which has induced our Courts to place such a construction upon the language of our statutes, leads us to the conclusion that the defendant's interest in his father's estate is not attachable within the meaning of the law. While it is unjust that one should keep from his creditors property which can be fairly sold or applied to the satisfaction of his debts, it is equally unjust that a creditor should seize and destroy an interest of his debtor which is so uncertain and contingent that it cannot be fairly sold or appraised. The policy of the law justifies the extension of the right of attachment to property which, though not strictly within the letter, is within the equity of the statute. It does not justify such an extension of that right as will be likely to result in the destruction

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of a paternal gift which can be of no present value to any one, and may never be of value to the debtor or his assignees." *Hill v. Boland*, 125 Md. 113; *Harris v. Whiteley*, 98 Md. 430; *Jordan v. Reynolds*, 105 Md. 288; *In re Gardner*, 106 Fed. R. 670; *In re Wetmore*, 108 Fed. R. 520; *In re Twaddell*, 110 Fed. R. 145; *Shryock v. Morris*, 75 Md. 72; *Humphrey v. Gerard*, 83 Conn. 346; *Hayward v. Peavey*, 128 Ill. 430; *Ducker v. Burnham*, 146 Ill. 9; *Watson v. Dodd*, 68 N. C. 528.

In the case at bar, the defendant had no such interest in the trust estates in the hands of the trustee as could be definitely ascertained and not being susceptible of appraisal, it could not be the subject of attachment.

The cases of *De Bearn v. Winans*, 115 Md. 604 and *De Bearn v. De Bearn*, 119 Md. 418, relied upon by the appellee, are entirely unlike this, and have no bearing upon the questions raised by this record.

For the reasons stated, the Court below committed an error in rejecting the appellant's prayer, and for this error, the judgment of condemnation will be reversed and as there can be no recovery, a new trial will not be awarded.

*Judgment reversed, without a new trial, with costs.*

THE JOHN W. WALDECK COMPANY,  
A BODY CORPORATE,

*vs.*

C. FRANK EMMART.

*Baltimore Practice Act: extension of time for filing pleas; written order necessary; failure: effect of—; judgment by default; additional pleas; without order, no effect. Re-instating case: discretion of court. Declarations: sufficiency of—; contracts need not be set out in full. Payments in installment: contracts for sealed instruments; covenant.*

Under the Baltimore City Speedy Judgment Act and its amendment by Ch. 184 of the Acts of 1894, the court may, for good cause shown, by its *order in writing*, passed at any time before judgment, extend the time for filing pleas and affidavits, and the right of the plaintiff to have judgment entered is suspended until the expiration of such extension; on appeal, in a suit brought under that Act, it was: *Held*, that where it did not appear from the record that there was any such order in writing, extending the time for additional pleas, and no writ of diminution was asked for, or granted, it must be assumed that the record is correct, and that no such leave was obtained, and the plaintiff, in such a case, could not be deprived of his judgment, if the prior pleas were insufficient, even though special pleas, filed without leave, constituted a good defense.

p. 473

Under the Baltimore City Speedy Judgment Act, as amended by Chapter 184 of the Acts of 1894, special pleas, although proper in themselves, if filed after a motion for a judgment by

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default, for want of proper pleas, are ineffectual to defeat the plaintiff's right to a judgment, unless it appears that the court passed an order in writing extending the time for filing pleas.

p. 473

Covenant is the only action proper on an agreement under seal for the payment of a sum of money in installments, where all the installments are not yet due.

p. 475

In an action on a written contract, whether the instrument be a deed or a simple contract, the contract need not be set out verbatim; it is sufficient if the legal effect be set out.

p. 475

In an action of covenant upon a lease, a declaration that states that the "plaintiff, by writing under seal, demised and let, \* \* \* , etc., and the defendant covenanted to pay, etc.," is not defective because of its not stating that the "*defendant therein covenanted.*"

pp. 475-476

In an action of covenant, the only general issue plea admissible is the plea of *non est factum*, and such plea puts in issue only the question of the execution of the deed; other defenses must be pleaded specially.

p. 476

Under Chapter 107 of the Acts of 1914, amending the Speedy Judgment Act of Baltimore City, if a judgment by default is entered for failure of the defendant to file a sufficient plea, etc., the court may, upon motion filed within 30 days of the entry of the judgment, strike out the same, and reinstate the case, with leave to the defendant to file additional pleas within ten days thereafter, provided the court is of the opinion that the interests of justice will be promoted thereby.

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*Decided January 13th, 1916.*

Appeal from the Superior Court of Baltimore City.  
(DUFFY, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*R. Contee Rose*, for the appellant.

*Wm. H. Lawrence* and *Edwin T. Dickerson*, submitted a brief for the appellee.

CONSTABLE, J., delivered the opinion of the Court.

This suit was brought by the appellant under the Baltimore City Speedy Judgment Act, Chapter 184 of the Acts of 1886, as amended by Chapter 184 of the Acts of 1894, the appellee being one of the defendants. The suit was filed on the 5th day of February, 1915, and on the 12th of that month the appellee filed a plea in abatement, by way of a motion for judgment of *non pros.* on the ground of non-residence, together with the necessary affidavit; and on the same day the Court extended the time for further pleading until ten days after the determination of the plea in abatement. On the 6th of March judgment of *non pros.* was refused on the plea, and on the 8th of March the appellee appeared and filed the pleas, never indebted and never promised as alleged, together with the necessary affidavit and certificate of counsel. On the 22nd of March the appellant filed a motion for judgment by default against the appellee for want of a sufficient plea and affidavit of defense. On the 8th of May the motion for judgment was overruled, with leave to reply within ten days. On the 24th of June the appellant having refused to reply or join issue, judgment was entered against him, and for the appellee for costs, and this appeal therefrom taken.

By the Act it is provided that where the cause of action is in contract the plaintiff, having filed a declaration at the time of bringing suit, together with an affidavit of the true amount due him and the writing or account upon which the defendant is indebted, shall be entitled to judgment on motion in writing at any time after fifteen days from the return day to which the defendant has been summoned, although the defendant may have pleaded, unless such plea

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contains a good defense, and unless the defendant shall under oath state every plea so pleaded is true; and shall further state the amount of plaintiff's demand, if anything, admitted to be due, and the amount disputed, and further that the affiant believes the defendant will be able at the trial to produce sufficient evidence to support the plea as to the part disputed, and that he is advised by counsel to file such plea; and such plea shall be accompanied by a certificate of counsel that he so advises the party making such affidavit.

By the briefs of each party it is stated that a special plea was filed on May 18th, ten days after the motion for judgment by default had been overruled. The appellee stating on the face of the plea that it was filed after leave of Court was obtained, and the appellant stating it was filed without such leave.

The record contains no such plea, and the docket entries make no mention of leave having been obtained to file additional pleas, except the extension above mentioned upon the filing of the plea in abatement, nor in fact do they show that the plea was ever filed.

The original Act and the amendment each contains the provision that the Court may, for good cause shown, by its order in writing passed at any time before judgment, extend the time for filing pleas and affidavits, and that the right of the plaintiff to enter judgment shall be suspended until the expiration of such extension.

Since the record does not show that the Court passed an order, in writing, to extend the time for filing additional pleas, and no writ of diminution was asked for, or granted, we will have to assume the record before us is correct, in that such leave was not obtained. Upon this assumption it is clear that the plaintiff could not be deprived of his right to judgment by default if the defense under the prior pleas filed was not sufficient, even though the special plea, filed without leave, constituted a good defense. In *Gemmell v. Davis*, 71 Md. 458, a suit under this same Act, the plaintiff demurred

to the plea filed, and while the demurrer was pending and no order extending the time for pleading had been passed, and several months after the defendant had been summoned, the defendant filed several additional pleas without leave of Court. Upon the demurrer being sustained judgment by default for want of a sufficient plea was entered, upon the motion of the plaintiff. This Court in affirming the judgment held the additional pleas should be regarded as mere nullities, because they were filed in violation of the terms of the statute. "This is the clear meaning of the terms of the statute, and if by construction a different meaning be attributed to them, such as that contended for by the defendant, they would virtually be deprived of all restrictive force, and the defendant in any case would be able to do what was attempted to be done in this case, that is, to defeat the plaintiff's right to judgment by simply placing upon record pleas and affidavits at any time before judgment entered, regardless of the fact that no cause had been shown nor any leave of Court obtained. To suffer this to be done would simply be in defiance of the express terms of the statute."

To determine whether the appellant was entitled to a judgment by default for want of a good defense, notwithstanding the appellee had filed pleas, with affidavit and certificate according to the terms of the Act, it will be necessary, before examining the pleas, to consider first the nature of the suit brought.

According to the averments of the declaration the appellee was the lessee of property from the appellant under a lease in writing and under seal, for a term of over six years beginning on May 15th, 1914, with a covenant that the annual rent was to be paid in equal monthly instalments from the beginning of the term until its ending on February 28th, 1921; and that the instalments of rent due in November and December, 1914, and January, 1915, were due and unpaid. At the time of bringing the suit the appellant filed an itemized account of the amount due under oath together with a copy of the lease.

Md.]

Opinion of the Court.

The cause of action being in contract, it was necessary to select the form of action in which the suit was to be brought. In *Chitty's Pleading*, Vol. 1, p. 118, it is declared: "It (covenant) is the proper remedy where an entire sum is by deed stipulated to be paid by instalments, and the value is not due, nor the payment not secured by penalty." *Platt on Covenants*, 3 Law Library, 545, Remedies and Relief Incident to Covenants, says: "Where money is stipulated to be paid by instalments until the whole debt is due, unless it be secured by a penalty, debt cannot be supported. Covenant in such case is the proper remedy and each successive default in payment at the appointed time, will give covenantee a fresh right of action for that particular instalment." And in *Poe's Pleading*, section 145, it is said, it is well settled that covenant alone will lie where there is an agreement under seal for the payment of a sum of money in instalments and they are not all due. It must be regarded as settled that the suit of the appellants should have been brought in covenant. And from an examination of the declaration we are convinced that it is in that form and is not open to the only objections raised by the appellee; they are, that it does not set forth fully the terms of the writing and omits that both parties covenanted under seal. It is not necessary in pleading in an action on a written contract, whether a deed or a simple contract, for the pleader to set out verbatim the written instrument, for it is open to him to either state its legal effect or set out in full. *Bullen and Leake, Precedents of Pleadings* (3rd Ed.), p. 58. As to the second objection, it is held by a number of authorities, that the word covenant imports a seal; but it is not necessary to enter into a discussion of that question, for we are of the opinion that the pleader has set out the fact that the defendant did covenant under seal. The count begins with the statement "for that the plaintiff, by writing under seal, demised and let \* \* \* and the defendants covenanted to pay, etc." It is true that if it had been said, the defendants *therein* covenanted, it would have been beyond question that the averment met the

objection, but we think it is equally to be inferred from the language used.

The question now is, whether the pleas never indebted and never promised as alleged are good pleas in an action of covenant. These pleas were probably filed as general issue pleas, but, though they are proper pleas in actions on simple contracts, they are not good pleas in actions on specialties. The only proper plea that is any way in the nature of a general issue plea in covenant is *non est factum* and that only denies the execution of the deed and all other defenses must be pleaded specially. *Poe's Pleading*, section 527; *Chitty's Pleading*, Vol. 1, p. 120, 518; *Bullen and Leake's Precedents of Pleadings* (3rd Ed.), 467. Beyond all question, these pleas were bad and contained no good defense to the action, and, therefore, the appellant was entitled to his judgment by default, and for this refusal we will reverse the judgment and remand the case.

If, after the record is returned, judgment is entered for the appellant, the appellee can, if he chooses, avail himself of the provisions of Chapter 107 of the Acts of 1914, Charter of Baltimore City, Revised Edition, Section 315A, p. 224. wherein it is provided that if any judgment is entered against any defendant for failure to appear and plead, or failure to file a sufficient plea, affidavit or certificate of counsel, the Court in which such judgment has been rendered may upon motion, filed by the defendant within thirty days of the entry of the judgment, strike out the same and reinstate the case, with leave to the defendant to file pleas or amend the pleas already filed, within ten days thereafter, provided the Court is of the opinion that the interests of justice will be promoted by so doing. If the appellee feels that under these technical rules justice has not been done him, the way is open to him to appeal to the discretion of the Court and have the merits of his case heard.

*Judgment reversed, with costs to the appellant and case remanded.*

URNER, J., dissented.

Md.]

Syllabus.

AMERICAN PAVING & CONTRACTING CO.

vs.

JACOB C. DAVIS.

*Declarations: sufficiency; evidence need not be included. Negligence: stationary engine; fire sparks—; spark arrester; damage to furniture; expert witnesses.*

All that is required of a declaration, in the way of allegations, is that it should set out such reasonable averments as will fully apprise the defendant of the nature of the charge against him, and enable him to prepare his defense. p. 481

The pleader is not required to set out in the declaration the evidence upon which he relies to establish his cause of action.

p. 481

In an action for damages for the injury done the plaintiff by the negligence of the defendant in its operation of an engine used in grading a road, near the plaintiff's dwelling, there need be no exact allegation as to the exact character of negligence complained of.

p. 481

The rule for the care to be used in such cases is that it must be commensurate with the risk or hazard involved.

p. 481

The mere fact that after the fire the defendant used a spark arrester on the engine is not admissible in evidence, as a confession of liability.

p. 481

A witness who has testified that he was a cabinet-maker, and that he was familiar with the cost of repairing furniture, and that he had seen the furniture for which damages were being claimed, for its injury by fire because of the defendant's negligence, is competent to testify as to the cost of repairing the furniture.

p. 483

In an action for damages because of injury by fire, through the negligence of the defendant, evidence that the plaintiff had received insurance money from the insurance he carried against loss by fire, is not proper for the consideration of the jury.

p. 485

*Decided January 13th, 1916.*

Appeal from the Court of Common Pleas of Baltimore City. (DAWKINS, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, UERNER, STOCKBRIDGE and CONSTABLE, JJ.

*George W. Lindsay* (with whom were *Richard B. and J. Royall Tippet*t, on the brief), for the appellant.

*W. Calvin Chesnut* and *W. Carroll Hunter*, for the appellee.

THOMAS, J., delivered the opinion of the Court.

The declaration in this case contains three counts. In the first count it is alleged that on the 18th of September, 1914, the plaintiff was the owner and occupant of a frame dwelling house on the northeast corner of Old York road and Wyanoke avenue, in Baltimore City, known as number 600 Wyanoke avenue, and also the owner of a large quantity of furniture and other household articles contained in said dwelling; that on the day mentioned the defendant, its servants and agents, were engaged in grading a portion of Old York road, one of the public highways of the city, and in the prosecution of the work operated a steam shovel opposite and in close proximity to the dwelling of the plaintiff, and that in consequence thereof the dwelling, furniture and other household articles of the plaintiff were partially destroyed by fire occasioned by sparks emitted from the shovel while being so operated, and was further damaged in an effort to extinguish the fire and to save the property from total destruction, and the plaintiff was also deprived of the use of the property for two and a half months; that the sparks were so emitted because the defendant, its servants or agents, negligently and wrongfully used upon the highway mentioned a steam shovel

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which was so constructed and equipped as to make its use dangerous to all buildings near the place of its operation, and that the fire was due to the lack of ordinary care on the part of the defendant, etc., in the selection and equipment of the steam shovel, and not to any negligence on the part of the plaintiff directly contributing thereto. The second count charges that the sparks were emitted because the steam shovel was negligently and carelessly operated by the defendant, etc., and the third count alleges that the sparks were emitted because of the negligence and carelessness of the defendant, etc., in not providing the steam shovel with suitable fixtures for preventing the emission of sparks therefrom after allowing a sufficient draft to create sufficient steam to properly propel the shovel, etc.

The defendant demurred to the declaration and each count thereof, but the Court below overruled the demurrer, and the trial of the case resulted in a verdict and judgment in favor of the plaintiff for \$1,382.50, from which judgment the defendant has appealed.

During the trial the defendant reserved eleven exceptions, the first ten of which are to rulings of the Court below on the evidence, and the remaining exception is to the action of the lower Court on the prayers. As the defendant's first, third and fifth prayers present the contention of the defendant, that there is no evidence in the case legally sufficient to entitle the plaintiff to recover for the damage caused by the fire to either the dwelling or furniture, they will, for the sake of brevity, be considered in connection with the ruling on the demurrer.

The plaintiff's house was located on the corner of Old York road and Wyanoke avenue, with a frontage of twenty-two feet on Wyanoke avenue and a depth of fifty-two feet on the Old York road. It was a frame dwelling, covered with wooden shingles, which had been on the house about twenty-five years. For some time prior to the fire, which occurred on the 18th of September, 1914, the defendant was engaged in grading Old York road, and in doing the work

used a steam shovel. The diameter of the smokestack of the engine, which extended several feet above the cab, was about ten inches. At the time of the fire the shovel was being operated at a point west of, and about thirty feet from, the rear end of the plaintiff's dwelling, and the wind, which was blowing from the west, carried the sparks from the smokestack to the plaintiff's house. There had been no rain for some time, and the shingles on the roof of the house were very dry. The defendant had been operating the steam shovel in the neighborhood for about ten days, and a number of witnesses testified that when the steam shovel was in operation large and glowing embers or sparks, ranging in size from that of a chestnut to that of a pigeon egg, were emitted in large quantities from the smokestack and blown from thirty to forty feet in the air. James A. Clark, the captain of No. 31 Engine Company, testified that while his company was engaged in extinguishing the fire, and he and the engineer of the company were on the third floor of the plaintiff's dwelling, sparks from the steam shovel about the size of his little finger fell upon them. The evidence also shows that there was no fire in the house during the afternoon of the day of the fire, and that the fire which destroyed the third story of the dwelling and caused the damage complained of, started on the roof and on the side next to where the steam shovel was in operation, and that the steam shovel was not provided with a spark arrester of any kind.

The contention of the appellant is that the declaration does not specify the particular act or acts of negligence relied upon, and that the evidence fails to show that the fire was caused by sparks from the steam shovel or was due to any act of negligence on the part of the defendant. In *Sims v. American Ice Co.*, 109 Md. 68, the first count charged that the sparks which caused the fire "were thrown out because the said defendants had negligently and wrongfully used upon the said line of railroad engines which were so constructed and equipped as to make the use of said engines dangerous to all combustible property near the line of said

Md.]

Opinion of the Court.

railroad," and that the fire was due to the lack of ordinary care on the part of the defendants in the selection and equipment of the engines, and the second count alleged that the sparks "were thrown out because the said engines were negligently and carelessly operated." The attention of the Court was directed to the declaration by the prayers and also by a demurrer to one of the pleas, and the Court below sustained the demurrer to the plea, and this Court, on appeal, affirmed the judgment in favor of the plaintiff. The allegations in the present case are not less specific. The pleader is not required to set out the evidence upon which he relies to establish his cause of action. All that is required of him is such reasonable certainty in the averments as will fully apprise the defendant of the nature of the charge against him, and enable him to prepare for his defense. *Phelps v. Howard County*, 117 Md. 175. Negligence in such cases may consist in the use of a steam shovel not properly constructed, or which was not in good order, or not supplied with suitable fixtures to prevent injury from fire, or may consist in the failure to exercise such care and diligence in using the same as would be exercised by skillful, prudent and discreet persons under like circumstances; *B. & S. R. R. Co. v. Woodruff*, 4 Md. 242; *B. & O. R. R. Co. v. Shipley*, 39 Md. 251; 33 *Cyc.* 1332-36.

In the case of *Green Ridge R. R. Co. v. Brinkman*, 64 Md. 52, the Court said: "In the plaintiff's third prayer the jury were told that if they believed from the evidence that the engine 'habitually scattered sparks to such an extent as to endanger combustible material along the line of the road,' it is a fact from which they may find negligence on the part of the defendant. In *A. & E. R. R. Co. v. Gantt*, 39 Md. 135, a witness stated that he had seen the engines 'scattering large sparks in passing, capable of setting fire to combustible articles along the road; and that about a week before he had put out a fire in the leaves caused by these sparks; but he could not say that he had ever seen any such sparks from the locomotive that was drawing the freight train on the morn-

ing of the fire.' CHIEF JUDGE BARTOL, in delivering the opinion of the Court, said: 'We entertain no doubt that this was competent and admissible evidence, both for the purpose of proving that the fire in question was occasioned by the locomotives, and as tending to prove negligence on the part of the defendant, in the construction and management of its engines.' " In the case of *Hodges v. Baltimore Engine Co.*, 126 Md. 307, 94 Atl. 1040, where there was evidence to show that the engine which was alleged to have caused the fire was not equipped with a spark arrester, and that sparks were emitted from the smokestack when the engine was in operation, JUDGE PATTISON, speaking for the Court, said: "What constitutes ordinary care and prudence in cases of this character depends upon the circumstances of the particular case. The greater the danger of communicating fire to the property of others, the more precautions and the greater vigilance will be necessary in order to measure up to the requirements of ordinary care," and then quoted the statement of the Court in *Martin v. McCrary*, 115 Tenn. 316, 1 L. R. A. (N. S.) 530: "The degree of care required by one threshing wheat with a steam thresher, in respect of setting fires, is the same as that devolved upon railway companies in the use of their engines. That rule, as laid down in *Louisville & N. R. Co. v. Fort*, 112 Tenn. 432, 80 S. W. 429, is that 'care commensurate with the risk or hazard' must be used. In the same opinion the degree of care required is thus characterized: 'A degree of care and prudence commensurate with the danger to which this property is exposed by them in the lawful conduct of their business.' \* \* \* 'As the danger necessarily attending the use of fire in locomotives is far greater in some places and upon some occasions than others, what is reasonable care in their equipment and management must always depend upon the facts and circumstances of each case. What would be ordinary care in the operation of them in the country, or in a wet season, might be gross negligence in a town or city, or in a drouth, where and when the danger of communicating the fire is, in the very

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Opinion of the Court.

nature of things much greater.' " See also *B. & S. R. R. Co. v. Woodruff*, *supra*; *B. & O. R. R. Co. v. Shipley*, *supra*; *Ryan v. Gross*, 68 Md. 377; *Sims v. American Ice Co.*, *supra*.

Upon the authorities cited the declaration was not open to the objection urged against it, and we think the evidence was legally sufficient to support its averments, and that it was for the jury to determine whether the fire was caused by sparks from the steam shovel, and whether under the circumstances the defendant was guilty of negligence in the operation of the steam shovel and in failing to equip it with a spark arrester.

There was no error in the ruling in the first exception. The witness had already testified to the condition of the furniture as the result of the fire; that he was a cabinet maker; had made many sets of furniture and knew from experience the cost of repairing furniture. He was therefore competent to state what it would cost to repair the furniture that was damaged by the fire.

The second, third, fourth, fifth, sixth, seventh and eighth exceptions are to the testimony of a number of witnesses who observed the size and quantity of sparks emitted from the smokestack of the steam shovel while it was in operation near the plaintiff's property within a few days before or after the fire, and to evidence to the effect that one of the plaintiff's neighbors had to use a hose to wet his house in order to prevent it from catching fire, and that when, a few days after the fire, the defendant's servants put a wire hood or screen over the smokestack, the sparks were very much smaller. Under the rulings in *Gantt's Case*, *supra*, and *Ryan v. Gross*, *supra*, this evidence was clearly admissible, not only for the purpose of showing that the fire was caused by the sparks from the steam shovel, but also as tending to show negligence on the part of the defendant. The mere fact that the defendant or its servants after the fire put a wire hood or screen over the smokestack would not be admissible for the purpose of establishing an admission of liability by the defendant

(*Ziehm v. United Electric, etc., Co.*, 104 Md. 48; *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202), but evidence of the effect of the screen was admissible as reflecting upon the question whether the defendant had exercised proper care and caution to avoid injury to the plaintiff's property.

The ninth exception is to the refusal of the Court to allow the witness to say whether the steam shovel in question threw out any more sparks than steam shovels usually throw out. In *Baltimore and York Turnp. Co. v. Crowther*, 63 Md. 558, the defendants offered evidence to show that it was a common thing on other turnpikes and roads in Baltimore County to find the central or artificial portions elevated above the sides fully as much as the macadamized part of the defendant's road at the place in question, but the Court sustained the plaintiff's objection to the evidence, and in disposing of the exception JUDGE MILLER said: "It was the duty of the jury to decide whether this particular road was safe by evidence of its actual condition, and not by comparing it with the condition of other roads. The fact that similar defects existed in other roads affords the defendants no excuse for their neglect of duty with respect to their own road." Upon the same principle the evidence referred to in this exception was properly excluded. See also *Wood v. Heiges*, 83 Md. 271.

A witness for the defendant having stated that in operating a steam shovel, the shovel "excavates dirt, lifts it and deposits it in wagons which haul it away at a distant point. The horses and wagons get as close to the shovel as possible," was asked if "any of the horses were burned as result of sparks emitted from steam shovel?" and the tenth exception is to the refusal of the lower Court to allow the question to be answered. It is not clear that the evidence of this witness referred to the operation of the particular shovel in question while it was employed in the neighborhood of the plaintiff's property, or that the witness ever saw the steam

shovel while engaged in that work, and the fact that no horses had been burned could not have aided the jury in determining whether the fire which injured the plaintiff's house was caused by sparks from the steam shovel, or whether the defendant had used proper care to avoid injury to the same.

The defendant's second prayer was withdrawn. Its fourth prayer asserted the proposition that if the plaintiff's house was insured, and he received the sum of \$885.00 from the insurance company in payment of the loss caused by the fire, he was not entitled to recover, and is disposed of by the case of *City Pass. Ry. Co. v. Baer*, 90 Md. 108, where it was said: "The sixth prayer asserts the correct proposition that any sick benefits received by the plaintiff from any other source than the defendant were not to be considered by the jury in making up their verdict," and the case of *Ches. Iron Works v. Hochschild*, 119 Md. 303, where this Court said: "The rule seems to be well established by the authorities that the fact of insurance cannot be set up in mitigation of damages whether such reduction is set up in mitigation in case of fire, life, marine or accident insurance."

Plaintiff's first prayer was approved in *Sims v. American Ice Co.*, *supra*. No objection was urged in this Court to the plaintiff's third prayer except that the case should have been withdrawn from the jury, and the objection to plaintiff's fourth prayer, which instructed the jury that they were not to consider the payment made by the insurance company, is disposed of by what we have said in reference to defendant's fourth prayer.

Finding no error in the rulings of the Court below the judgment will be affirmed.

*Judgment affirmed, with costs to the appellee.*

JOHN SHULTZ SHRIVER ET AL.

*vs.*

MARTHA N. SHRIVER.

—  
MARTHA N. SHRIVER*vs.*

JOHN SHULTZ SHRIVER ET AL.

*Testamentary law: "heirs," who are; widow not "heir" of deceased husband.*

Where one, to whom an estate for life was devised to take effect after the death of a life tenant, and then to his heirs, dies before the first life tenant, then, whether the estate devised to the second life tenant be considered as one that was vested but defeasible, or as merely contingent, the share he would have received becomes vested, by way of substitution or succession, in the persons to whom the will refers as his heirs. p. 488

A widow is not, in a technical sense, an "heir" of her husband, as to his realty. p. 489

The word "heir" is technically and literally applicable only to one who *inherits* real estate. p. 489

The title of an heir originates at the death of the person from whom he inherits; he takes a fee by descent. p. 489

The widow's dower attaches as an inchoate interest during her husband's life; it is a limited life estate. p. 489

Where personal property was devised to remaindermen named, "*or to their heirs,*" and one of the parties died before a preceding life tenancy expired, it was: *Held*, that one-half of his share of such property should be distributed to his widow, as under the Statute of Distribution, there being no children or descendants of such legatee. p. 492

*Decided January 14th, 1914.*

Md.]

Opinion of the Court.

Two appeals from the Circuit Court of Baltimore City.  
(DOBLER, J.)

The facts are stated in the opinion of the Court.

The causes were argued together before BOYD, C. J.,  
BURKE, THOMAS, UENER and STOCKBRIDGE, JJ.

*Willis & Willis*, for John Schultz Shriver *et al.*

*Frank Gosnell*, for Martha N. Shriver.

UENER, J., delivered the opinion of the Court.

The will of J. Alexander Shriver, of the City of Baltimore, after devising and bequeathing all of his estate to his wife, Olivia B. Shriver, during her life, or so long as she remained his widow, provided as follows:

"After the death of my wife or her marriage again, (upon the happening of the latter, I give and bequeath to her absolutely, such portion of my estate as would be her proper share thereof under the existing law of the State of Maryland,) then and thereupon I desire and direct all the remainder of all my property devised and bequeathed to her for life or widowhood, shall be divided equally among my heirs, namely: Alice S. Clendinen, Frederick, John Shultz, Clarence and Joseph Alexis, share and share alike, or to their heirs, should either have deceased at that time."

The testator died in 1891 survived by his wife and all the children named in the will. The estate, consisting of both real and personal property, passed to the widow under the provision in her favor and was held by her until her death, which occurred within the past year. During the life tenancy, Frederick Shriver, one of the sons mentioned in the will, died without issue but leaving a widow, Martha N. Shriver, who is now living, and the only question we are to consider is as to the nature and extent of her interests, if any,

in the portion of the estate to which her husband would have been entitled if he had lived until the period of distribution.

It was determined by the Court below that, according to the proper construction of the will, Frederick Shriver had a vested but defeasible interest in remainder in one-fifth of the estate, and that his interest was subject to be divested in the event of his death during the period of the life tenancy, and, as that contingency had happened, it was ruled that his share of the estate passed to his "heirs," who, in reference to the realty, were decreed to be those only who would have inherited that kind of property from the deceased remainderman, and with respect to the personalty were held to be those, including the widow, who would be entitled, under the statute of distributions, as in case of intestacy. In consequence of this decision the widow was excluded by the decree from any interest in the real property, but was awarded, under the statute, one-half of the personal estate which her husband would have received if he had survived. The widow objects to the decree because it does not recognize her claim of dower in the realty, and her husband's brothers and the children of his sister, Mrs. Clendinen, who also died before the life tenant, object to the admission of the widow to a share of the personalty. The two appeals in the case represent these conflicting theories.

Whether the qualified estate devised and bequeathed by the will to Frederick Shriver in remainder be regarded as vested though defeasible, or as merely contingent, there can be no question that, in view of his death before the termination of the preceding life tenancy, the share of the estate which he would have received has become vested, by way of substitution or succession, in the persons to whom the will refers as his "heirs." *Reiff v. Strite*, 54 Md. 298; *Straus v. Rost*, 67 Md. 465; *Engel v. Geiger*, 65 Md. 539.

The single inquiry we are to make, therefore, is as to the meaning and application of the term "heirs" as used in the clause of the will which provides for the ultimate vesting of the estate.

Md.]

Opinion of the Court.

In regard to the question as to who are entitled to the *real estate* devised in remainder, we must hold, upon elementary principles, that the widow is not to be classed as an "heir" of her husband with respect to that species of property. The word "heir" is technically and literally applicable only to one who *inherits* real estate, and the widow's interest in her husband's lands is not thus acquired. The title of the heir originates at the death of the person from whom he inherits, while the widow's dower attaches as an inchoate interest during her husband's life. The heir takes the fee by descent, and the widow takes her limited life estate by virtue of the marriage. According to the settled meaning of the term at common law, an "heir" is one in whom the law vests the estate in the lands of the ancestor immediately upon his death. *Hoover v. Smith*, 96 Md. 395; 4 *Words and Phrases*, 3241; 21 *Cyc.* 411. When used to designate devisees of real estate, and when a different interpretation is not required by the context, the word "heirs" is confined to its primary significance and is applied exclusively to those who would *inherit the land* of the ancestor to whom reference is made for their identification. As the widow sustains no such relation to her husband's estate at common law, she is nowhere regarded as one of his heirs, except in jurisdictions where she has been included by statute among those to whom his lands pass by descent. *In re Raleigh's Estate*, 206 Pa. St. 451; *Lord v. Bourne*, 63 Me. 368; *Wells, Guardian, v. Moore*, 16 Mo. 478; *Miller v. Finegan*, 26 Fla. 29; *Blackman v. Wadsworth*, 65 Iowa, 80; *Weston v. Weston*, 38 Ohio St. 473; *Menard v. Campbell*, 180 Mich. 583; *Proctor v. Clark*, 154 Mass. 48; 40 *Cyc.* 1463. There is nothing in the will before us to enlarge the meaning of the word "heirs" as applied to the devisees of the testator's realty, and as the deceased remainderman was not himself given such an estate in the lands as could be subject to a right of dower in his widow, there is no ground upon which her claim to an interest in the real estate passing under the will can be sustained.

The question as to whether the widow is to be regarded as one of the "heirs," so far as the disposition of the *personal estate* is concerned, was properly determined by the Court below in accordance with a principle of construction which was stated in *Gordon v. Small*, 53 Md. 562. There was a declaration of trust, in that case, creating a life estate in a fund of six thousand dollars, with remainder to the issue of the life beneficiary, and in default of such issue, then to the "right heirs" of the donor. This provision differed from the present in the fact that the alternative remainder was given to the heirs by direct limitation and not by way of substitution. In reference to such a limitation it was said by the Court, through JUDGE ALVEY, to be clear that "the words 'right heirs' were not intended to have different meanings, according to the nature of the property in which the trust fund may have been invested. If a party limits an interest or estate in trust to his heir, or to the heir of another person, the proper sense and meaning of the word is not necessarily to be departed from because the subject of the donation or trust happens to be personal estate. It is perfectly competent to a party to give to his heir or heirs by that description alone, if it sufficiently designates the party or parties intended to take, any sum of money that the donor may think proper to give, or even the whole of his personal estate. It is simply a question as to what persons or class of persons were intended to be embraced by the description; and the rule of construction is, that the terms employed should be allowed their established legal signification, unless controlled by the context of the instrument." After citing and discussing several English decisions in support of the statement just quoted, the Court proceeded to say: "There are cases, certainly, and a considerable number of them, and of high authority, which hold that where the gift is to the heir or heirs by way of substitution for the original or preceding legatee or donee, as, for instance, where the gift is to 'A. or his heirs,' the word 'heirs' is construed as meaning the per-

Md.]

Opinion of the Court.

sons who would be entitled to take the personal estate of A. in case of intestacy; that is to say, the word 'heirs' is held to mean those persons who would be entitled to the personal estate of A., the first donee or legatee, by virtue of the Statute of Distributions, if that person had died intestate, including therefore a widow, but not a husband" (under the statute then in force). "As examples of such cases, we may refer to *Vaux v. Henderson*, 1 J. & W. 388, and note; *Gittings v. McDermott*, 2 M. & K. 69; *Doody v. Higgins*, 2 K. & J. 729. But in this case the limitation of the estate is not by way of substitution, within the meaning of the authorities, but the terms *right heirs* are used simply to describe donees in remainder; and therefore the case falls directly within the principle laid down in the cases of *De Beauvoir v. De Beauvoir*, 3 H. L. Cases, 524; *Mounsey v. Blamire*, 4 Russ. 384, and *Smith v. Butcher*, 48 L. J. Ch. 136, to which we have already referred."

The theory of this distinction was applied in *Fabens v. Fabens*, 141 Mass. 399, where it was thus explained: "No general rule can be stated under which all the decisions can be classified. But in general, where there is a gift to a person or his heirs, the word 'heirs' denotes succession or substitution; the gift being primarily to the person named, or, if he is dead, then to his heirs in his place. In such cases, it has often been held that the word 'heirs' should be construed to mean the persons who would legally succeed to the property according to its nature or quality; and that the heirs at law would take the real estate, and the next of kin or persons entitled to inherit personalty would take the personal estate. Such were the cases, amongst others, of *Keay v. Boulton*, 25 L. R. Ch. Div. 212; *Wingfield v. Wingfield*, 9 L. R. Ch. Div. 658; *Vaux v. Henderson*, 1 Jac. & W. 388, and *Doody v. Higgins*, 9 Hare, App. XXXII. But where the gift is directly to the heirs of a person, as a substantive gift to them of something which their ancestor was in no event to take, this element of succession or substitution is

wanting, and the heirs take as the persons designated in the instrument to take in their own right; and in such cases the Courts have usually held that the word 'heirs' must receive the meaning which it bears at common law, as the persons entitled to succeed to real estate in case of intestacy."

The present case is plainly subject to the principle of the distinction and rule stated in the Maryland and Massachusetts decision to which we have referred and the English cases therein cited with approval. The limitation here is to the primary remaindermen "or to their heirs," and the element of substitution by way of legal succession is involved. When the term is thus employed in regard to a bequest of personalty, the question is not who would be the heirs at law, in a technical sense, of the person named, but who would be entitled to his personal estate upon the theory of his death without a will. Under our Statute of Distributions, the widow succeeds to one-half of her deceased and intestate husband's personalty, where, as in this case, there are no children or descendants, and she was properly allowed by the decree to share in the estate to that extent.

The cases cited in the briefs, and others which we have examined, disclose a wide difference of judicial opinion as to the scope and effect of the term "heirs" as applied to legatees or donees of personal estate, but the citations we have made are sufficient to illustrate and support the rule on the subject which has been recognized in this State, and which is precisely adapted to the special conditions of the case presented by this record.

*Decree affirmed, as to each of the appeals, one-half of the costs, including the cost of printing the record, to be paid by the respective appellants.*

Md.]

Syllabus.

CHARLES O. CACY

vs.

WILLIAM M. SLAY ET AL.

*Mortgages: payment; bill to compel release; burden of proof; mortgage notes; presumption as to; Code, Article 66, section 25, not retroactive. Witnesses: competency; other party dead. Administrators: duty of—.*

The presumption of payment in favor of a mortgagor in possession for over 20 years is not conclusive. p. 497

When relief is sought by a bill in equity to compel the release of a mortgage, on the ground of payment, an *allegation* of payment is insufficient, and must be supported by proof. p. 498

On appeal from a decree refusing to direct the execution of a release of a mortgage, alleged to have been long overdue, etc., the cause was remanded, under section 38 of Article 5 of the Code, without reversing or affirming the decree, for further proceedings; it being: *Held*, that there was not sufficient evidence to justify action on the bill. p. 501

Section 25 of Article 66 of the Code, providing that the recorded release of a mortgage shall cause it to be conclusively presumed that the notes secured thereby are paid, so far as any lien on the property is concerned, is not retroactive. p. 499

The statute, section 3 of Article 35 of the Code, excluding the evidence of one party to a transaction, when the other party is dead, was passed to prevent injustice being done, and not to cause it. p. 501

An administrator must see that the estate of his decedent is protected from unjust claims, but it is also his duty to aid in reaching a just conclusion as to them. p. 501

*Decided January 14th, 1916.*

Appeal from the Circuit Court for Kent County. In Equity. (HOPPER and ADKINS, JJ.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, UNER and STOCKBRIDGE, JJ.

*L. Wethered Barroll* (with whom were *Hope H. Barroll* and *Robert J. Gill* on the brief), for the appellant.

*Lewin W. Wickes* (with a brief by *William M. Slay*), for the appellees.

BOYD, C. J., delivered the opinion of the Court.

A bill in equity was filed in this case by the appellant against the executors of Richard D. Hynson, deceased, and Edwin L. Maslin. It alleges that the appellant executed a mortgage to Edwin L. Maslin on May 17, 1889, to secure the sum of \$600.00, for which five promissory notes were given, one for the principal, payable two years after date, and the other four being interest notes, one of which was payable every six months. The mortgage was on two farms in Kent County and one in Queen Anne's County. The bill further alleges that the loan was secured through Richard D. Hynson, who was at the time the appellant's attorney and drew the mortgage; that the plaintiff paid the loan to said Hynson, who was also attorney for Maslin, and he believed that the mortgage had been released by said Hynson, who told him that he would see that it was released, and who had received every dollar of the principal and interest secured by the mortgage; that in the early part of 1914, he attempted to get a loan on the farm in Queen Anne's County, when he was informed by the attorney examining the title that the Maslin mortgage remained a lien of record on said farm, and although twenty-one years old and paid by the appellant to Mr. Hynson, a loan was refused until the record was cleared of

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said mortgage; that he saw Maslin who said he did not remember the occurrence, and informed the appellant he would have to consult his attorney before he could tell him anything more about it, but he had been paid in full by Richard D. Hynson, and subsequently informed the appellant's attorney that he had made an assignment of the mortgage to Mr. Hynson and he could not remember any of the particulars concerning it; that he was advised by his attorney that he would have to apply to the administrators of Richard D. Hynson, who died in 1907, and ask them to release the mortgage; that he saw William M. Slay, one of the administrators, and was informed by him that they would not release the mortgage; that he was in ignorance of any claim made by said Hynson in his lifetime, or by his administrators until informed by Mr. Slay that they claimed the debt was due; that he denies any and all indebtedness claimed by the administrators, but avers that if there ever was any such indebtedness due by him to said Hynson, it had been fully satisfied and discharged by payment to said Hynson in his lifetime; that if said Hynson or his administrators had any cause of action against him for any of the indebtedness claimed to be due under the mortgage, which he does not admit, such cause of action or suit did accrue or arise over twenty years before the filing of the bill and he prays the benefit of the statute of limitations; that said Hynson never made any demand upon him in his life time for any part of the debt or interest from the time it was paid until his death in 1907, and none of the defendants as administrators made any claim or demand upon him until the refusal of said Slay to release the mortgage, who stated that the estate would claim that it was a just debt due by appellant.

The bill prays: (1) That the mortgage lien be removed "as a blot" from his title to the farm in Queen Anne's County, and from the lands in Kent County; (2) that a decree be passed ordering and directing the administrators to execute a valid release; (3) that in the event of their refusal to release the mortgage a trustee be appointed to release said

mortgage lien of record in Queen Anne's County, and (4) for general relief. The answer denies most of the material allegations of the bill, including the alleged payment of the mortgage.

The appellant was called as a witness in his own behalf, and exceptions were filed to most of the questions in chief asked him, on the ground that he was incompetent under the statute to testify. He is, under section 3 of Article 35 of the Code, incompetent to testify "to any transaction had with, or statement made by, the testator, intestate, ancestor, or party so incompetent to testify, either personally or through an agent since dead, lunatic or insane, unless called to testify by the opposite party," etc. There can, therefore, be no doubt that most of his evidence—practically all of it that is material—must be excluded. It is said by the appellant's solicitors that he can testify as to admissions by Mr. Maslin, as he is still living, but the difficulty about that is that the bill alleges that Mr. Maslin had told appellant's attorney that he had assigned the mortgage to Mr. Hynson. If that be correct, and there is nothing to show that it is not, the administrators of Hynson can not be bound by statements or admissions made by Maslin after he assigned the mortgage. Why the appellant did not call him as a witness is not shown, but he was not called, and if he knows any facts material to the case, the Court is left in the dark as to his knowledge. The plaintiff's evidence as to what occurred between him and Mr. Slay throws but little light on the question, although he was competent to testify as to that. Mr. Slay is not incompetent as a witness because he is one of the administrators of Mr. Hynson, as the appellant contends. At one time such was the statute, subject to certain exceptions, but that has long since been changed. The difficulty is that Mr. Slay has no personal knowledge of the original transaction, and he does not know whether or not the mortgage was in fact paid. He did testify that he as administrator had this mortgage in his possession for some time, but can not now find it and does not know what became of it. Then his testi-

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## Opinion of the Court.

mony as to what he found in Mr. Hynson's check book, in answer to the general interrogatory, was not excepted to and has some relevancy to the matter in issue. He said: "And perhaps I had as well give the literal copy of Mr. Hynson's check-book stub, which is as follows: 'Jan. 23, 1893. To Chas. T. Westcott, for Maslin mortgage, \$600.00, and interest paid by Miss Julia Cacy, \$18—\$618.00.'" That looks as if Mr. Hynson made out his check to Mr. Westcott for that mortgage, but whether the check was delivered and paid, or, if it was, why he paid Mr. Westcott for it, or whether Mr. Hynson was taking an assignment of the mortgage or paying it off, we are not informed. Mr. Westcott may have been acting as attorney for someone in receiving it, and Mr. Hynson may have been so acting in paying it. Apparently, Miss Julia Cacy had at least \$18.00 in it.

The difficulty is that we have no evidence before us to show that the appellant ever paid the mortgage, for when his testimony on that subject is excluded, as it must be, there is nothing to sustain his bill in that respect. Mr. Hynson died June, 1907—fourteen years after the transaction above referred to, when his check book shows he made out a check to Mr. Westcott, and only seven years before this bill was filed. If that memorandum is accepted as evidence to show that Mr. Hynson obtained the mortgage, it is also evidence of the fact that it was not paid up to that time, although nearly two years overdue. But there is nothing to show that the appellant did not make some payment or payments on the interest or principal within twenty years before the bill was filed. So far as we know, he might have done so shortly before the death of Mr. Hynson. As was said in *Brown v. Hardcastle*, 63 Md. 484: "The presumption of payment in favor of a mortgagor in possession over twenty years is not conclusive, but may be rebutted by evidence of part payment of principal or interest, or by admissions of the debt's existence or other circumstances from which it may be inferred the debt has not been paid. In other words, a rec-

ognition of the mortgage debt involving a promise to pay it will remove the bar of the statute of limitations." The Court quoted from *Stump et al. v. Henry et al.*, 6 Md. 209, that "payment of part of a mortgage will prevent it from being barred by limitations for twenty years afterwards, although the mortgagor may have been in possession for nineteen years and upwards prior to the payment." A number of other cases in this State are to the same effect as those mentioned.

It is true that, such being the law, it may be all the more necessary for a mortgagor to have a mortgage released, if he had paid it, as no one examining the title would treat the mortgage as paid merely because the twenty years had elapsed since it matured, but the appellant overlooks the fact that he is now asking the Court for affirmative relief. When he comes into a Court of Equity to compel a release of the mortgage, he must not only allege, as he did, but must prove that the mortgage has been paid, or at least that he is entitled to have it released by those he proceeds against. The appellant places great reliance upon *Baldwin v. Trimble*, 85 Md. 396, but that was a very different case from this. There a vendee was resisting a bill for specific performance on the ground that the title of the vendor was not merchantable. Amongst other defences which he relied on was a deed of trust which was on record. This Court held that it must be treated as a mortgage, and, through CHIEF JUDGE McSHERRY, said that "as *thirty* years have intervened between the maturity of the mortgage and now, without recognition of its being a subsisting lien, the bar is absolute and complete." It was held that it was not a cloud on the title, but the owner of the property was not seeking the affirmative relief of asking that the mortgage be released. Moreover, there is nothing in this case to show that the mortgage was "*without recognition of its being a subsisting lien.*" All that we have before us is a certified copy of a mortgage which matured twenty-three years before it was filed in this case,

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but which, the little evidence which is before us tends to show, was in force at least two years after it matured.

But, regardless of that, what is there to show that the administrators have any right, much less that it is their duty, to release the mortgage? We can not be certain from this record that Mr. Hynson ever owned it. There is no assignment of it before us, and presumably there is none on the record, as the copy filed does not show any. CHIEF JUDGE MCSHERY said, in *Demuth v. Old Town Bank*, 85 Md. 315, that prior to the Act of 1892, Chapter 392 (which does not apply to this case), the law of this State was and still is, unless subject to that Act, "that the indorsement or assignment of a promissory note secured by a mortgage gives to a *bona fide* holder of such note the benefit of the lien of the mortgage as fully as though he had been named as the actual mortgagee; and this, too, though the public records furnish no evidence of the indorsement or transfer and delivery of the note. The transfer or indorsement of the note, which is the principal, carries the mortgage, which is the incident, and effectually clothes the *bona fide* holder of the note with the lien of the mortgage itself." Again JUDGE MCSHERY said: "From the moment of that indorsement and delivery, it ceased to be in the power of Price to release the mortgage so as to deprive the bank, by which the note was held, of the benefit of its security under the mortgage." Price was the mortgagee in the mortgage involved in that case. That was changed by the Act of 1892, which was amended by Chapter 719 of the Act of 1910, being now section 25 of Article 66 of the Code, but this mortgage was given in 1889 and the statute is not applicable.

The note for the principal is not accounted for in any way, although possibly it was not assigned to the person to whom the mortgage was assigned. The bill alleges that Mr. Maslin said he assigned the mortgage to Mr. Hynson, but, if he did, then the memorandum in Mr. Hynson's check book is peculiar—unless it be that Mr. Hynson first assigned it to Mr. Westcott, and the latter afterwards reassigned it to

Mr. Hynson. There is a statement in Mr. Collins' evidence to the effect that J. P. Ahern said that W. W. Beck told him that the mortgage had been transferred by Maslin to Charles T. Westcott, and by him to Hynson, but that is purely hearsay.

But notwithstanding what we have said, there are several things in the record which lead us to believe that it may be possible to obtain more evidence than is before us, and as it may do a great injury to the appellant if the mortgage is not released, if he has in fact paid it, we have concluded to remand the case without affirming or reversing the decree, in order that he may have an opportunity to produce more testimony, if possible. Of course, he can call Mr. Maslin and Mr. Slay, if he desires, and could still rebut their testimony, if he has the evidence, under Section 5 of Article 35. The administrators should do everything possible to get at the actual facts. As Mr. Slay testified that he had this mortgage in his possession at one time, he may be able to find it, on making a more thorough search for it, or he may be at least able to state more definitely whether there was an assignment on it, and, if so, from whom to whom, etc. With his testimony-in-chief he filed what he said was a part of the letter he wrote to Mr. Cacy on May 15, 1914, and testified that the facts therein stated are true and correct. Amongst other things contained in that paper are the following: "Mr. Hynson never got the Maslin mortgage until January 23, 1893, when he paid Chas. Westcott and took an assignment of the same to prevent Mr. Westcott from selling the Queen Anne's farm, and the Hynson estate still holds both mortgages with a credit on them much less than twenty years old. He advanced these sums to you solely to accommodate you and keep your lands from being sold and yet you claim to have paid him who never pressed a man in his life except where it was absolutely necessary to save his money, then only in rare cases." If such are the facts, legal evidence of them should be produced, but of course that memorandum of what Mr. Slay wrote to Mr. Cacy is not evidence on his own offer.

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## Opinion of the Court.

We have determined upon the course we will adopt in this case because we hope, to use the language of the statute, Section 38 of Article 5, that "the purposes of justice will be advanced by permitting further proceedings in the cause," but we are aware that it will depend largely upon the parties, or their attorneys, as to how far that much to be desired end will be accomplished. There is ordinarily but little reason for controversies of this character in Court, if both parties only want what they believe they are entitled to. The attorneys ought to be able to get the actual facts, if they make the proper effort to do so, and should not be governed too much by the technical rules of law in an honest effort to ascertain the truth in reference to matters which occurred so long ago. The statute is wise in excluding the evidence of one party to a transaction when the other is dead, but it was passed to prevent injustice being done, and not to cause it, if that can be avoided. Of course, the administrators must see that the estate of their decedent is protected from unjust claims, but it is also their duty to aid in reaching a just conclusion, as they have under their control the books and papers of their intestate, to which the opposite party has not equal access. On the other hand, a plaintiff seeking such relief as this one is ought not to be overly technical about the use of the books and papers of the decedent which may reflect on the question. If the attorneys will approach the case in that spirit, we feel confident that a just conclusion will more surely be reached than by disposing of it on such a record as is now before us.

*Cause remanded, without reversing or affirming the decree, for further proceedings, in accordance with this opinion.*

## JOHN GUTOWSKI

vs.

## THE MAYOR AND CITY COUNCIL OF BALTIMORE, A BODY CORPORATE.

*Patapsco River: jurisdiction over—; loading dynamite. Baltimore City: enforcing statutes. Police Department.*

The provisions in the Charter of Baltimore City, authorizing it to provide by ordinance for preserving the navigation of the Patapsco River and its tributaries; for establishing the limits beyond which piers, etc., may not be built; for cleaning and deepening the channels; for removing obstructions to navigation, etc.; for regulating the anchoring or moving of vessels; for regulating the use of wharves and piers, with penalties for the violation of the same, do not confer any power to regulate the loading of explosives in vessels stationed either within or beyond the city limits, excepting as to the location and movement of vessels receiving or discharging such cargoes. p. 504

Inasmuch as the Police Department of the City of Baltimore is controlled by a commission appointed by the Governor of the State, and operating independently of the municipal government, the city is not liable for damages on account of the non-performance of its police regulations, except in cases where its own conduct has produced the conditions which caused the injury. p. 505

The exercise by the City of its authority to provide for the safety of persons or property, where its corporate or proprietary interests do not require such action, is a governmental function for the non-performance of which it can not be sued, unless such a right of action is given by statute. p. 507

*Decided January 14th, 1916.*

Md.]

Opinion of the Court.

Appeal from the Court of Common Pleas of Baltimore City. (AMBLER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*David Ash* (with whom was *Charles Jackson* on the brief), for the appellant.

*Robert F. Leach, Jr., Assistant City Solicitor* (with whom was *S. S. Field, City Solicitor*, on the brief), for the appellee.

URNER, J., delivered the opinion of the Court.

The City of Baltimore is sued in this case, with other defendants, on account of personal injuries sustained by the plaintiff while engaged, as an employee of a stevedoring company, in the work of loading a vessel with a cargo of dynamite. The injuries were caused by an explosion resulting, as alleged, from the use of iron hooks in the process of moving and storing the boxes in which the dynamite was contained. It is averred in the declaration that the cargo was being loaded into the vessel at a point in the Patapsco River within the jurisdiction and under the control of the Mayor and City Council of Baltimore, and subject to municipal laws, ordinances and regulations which prohibited the use of iron hooks in such work, and which the City had undertaken to enforce, but negligently permitted to be disregarded. There are further allegations of negligence, but as they are directed against the other defendants, whose liability is not now to be determined, they need not be recited. A demurrer to the declaration was filed by the City and was sustained.

The plaintiff not having availed himself of the right to plead over, a judgment for the City was entered and is the occasion of this appeal.

It is not alleged that the place of the accident was within the *corporate limits* of Baltimore, and it is conceded in effect that the explosion occurred at a point in the river beyond the City boundaries, but the averment that the dynamite was being loaded on the vessel at a location within the jurisdiction and control of the municipality has reference to a provision of the City Charter giving the Mayor and City Council authority to pass ordinances for certain purposes relating to navigation and docking facilities on the river and its tributaries throughout their entire length. These provisions, however, do not purport to confer any power to regulate the loading of explosives in vessels stationed either within or beyond the City limits. They authorize the municipality to provide by ordinance for preserving the navigation of the river and its tributaries, for establishing lines beyond which no piers, wharves or other structures should be built or extended in the waters mentioned, for improving, cleaning, deepening, surveying and marking their channels, for removing therefrom anything detrimental to navigation or health, for regulating the stationing, anchoring and moving of vessels, for preventing refuse or material of any kind from being deposited or washed into the waterways, for erecting, maintaining and regulating the use of wharves, bulkheads, piers and piling, for the collection of dockage, wharfage and other charges, for the appointment of such officers and employees as might be necessary to accomplish the objects specified, and for the imposition of fines or penalties for a breach of any ordinance passed in pursuance of the powers thus conferred. (Baltimore City Charter, sec. 6 (8).)

It is apparent that these designated purposes do not include the regulation and supervision of the methods employed in the transfer of explosives, except as to the location and movement of vessels engaged in receiving or discharging such

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## Opinion of the Court.

cargoes. The police power, delegated by the charter, to provide "for securing property and persons from violence, danger and destruction," and doubtless its general welfare powers under the charter, would enable the City to require suitable precautions to be taken in the disposition of dynamite and other dangerous agencies, but the grant of such authority does not provide for its exercise beyond the corporate area. If, as alleged in the declaration, an ordinance has been passed prohibiting the use of metal hooks in the movement of explosives, such an enactment could not be supposed to have an extra-territorial effect merely because the City has been given the right to legislate for other designated and distinct purposes with respect to the harbor approaches lying outside of the municipal boundaries.

But if it be assumed that the City's police power to regulate the disposition of explosives is co-extensive, as to the area of its proper exercise, with the powers specifically granted in relation to the Patapsco River and its tributaries, there would still be a serious obstacle to the maintenance of such a suit as the present against the Mayor and City Council. The Charter of the City makes it the duty of the Board of Police Commissioners to enforce the municipal ordinances. (Charter, Sec. 744). It has been definitely held that inasmuch as the police department of the City is controlled by a commission appointed by the Governor of the State, and operating independently of the municipal government, the City is not liable for damages on account of the non-enforcement of its police regulations, except in cases where its own conduct has produced the conditions which caused the injury. In the case of *Taxicab Co. v. Baltimore*, 118 Md. 359, a contractor had left a quantity of building material in the street at night without placing a light to give warning of its presence. The plaintiff's taxicab collided with this obstruction, and the City was sued, with the contractor, for the damage thus occasioned. A municipal ordinance provided that whenever any piles of building materials were left in the street, a lighted

lamp or lantern should be placed on them at night so that they could be readily observed. There was a penalty prescribed for the violation of this requirement. As the City did not authorize the obstruction in question, and as it had no control over the police department to which the enforcement of its ordinances was committed by statute, the decision in the case was that the suit against the municipality could not be maintained. The same conclusion had been reached upon a somewhat similar state of facts in *Sinclair v. Baltimore*, 59 Md. 592.

In *Altwater v. Baltimore*, 31 Md. 465, a pedestrian was struck and injured by a sled coasting on the street in pursuance of a practice which was so general and frequent as to be a nuisance. While it was the duty of the Mayor and City Council to pass suitable ordinances, as authorized by the charter, for the prevention and removal of nuisances, it was held that since the duty of enforcing such ordinances had been devolved upon an independent police department, the City could not justly be subjected to liability for their non-enforcement. But the City has been held properly chargeable with responsibility for injuries in cases like *Baltimore v. Beck*, 96 Md. 183, where it failed in the affirmative duty of lighting the street on which the accident occurred; and *Baltimore v. Walker*, 98 Md. 637, where it negligently located a water pipe on a sidewalk in such a position that it extended several inches above the surface; and *McCarthy v. Clark*, 115 Md. 454, where an obstruction was placed on a sidewalk by contractors employed by the City in sewer construction. In the latter cases the injuries complained of did not result from the violation by others of ordinances which were not being actively enforced, but from conditions which the City's own conduct or dereliction of duty were alleged to have directly produced.

Upon the principles applied and illustrated in the cases to which we have referred it would seem to be clear that damages are not recoverable from the municipality by a per-

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Opinion of the Court.

son injured in consequence of the violation of a municipal ordinance regulating the movement of explosive substances, unless the City itself caused or sanctioned the particular conditions or acts which produced the injurious results. This would certainly be the rule in regard to accidents of that character within the corporate limits, and we find no justification in its charter for imposing a greater or stricter liability upon it with respect to similar occurrences on the waterways beyond its borders which the charter has placed under its control. It is not alleged in this case that the City authorized or occasioned the dangerous practice mentioned in the declaration, but the averment is simply that it neglected to enforce its regulations prohibiting the employment of such methods. This is not a sufficient basis upon which to charge the City with actionable responsibility for the accident.

There is still another consideration which prevents the acceptance of the theory of liability upon which the suit is predicated. The exercise by the City of its authority to provide for the safety of persons or property, where its corporate or proprietary interests do not require such action, is a governmental function for the non-performance of which it can not be sued, unless such a right of action is given by statute. For example, in establishing a system of gratuitous water supply for extinguishing fires, the City acts in its governmental capacity, and for its failure to provide a sufficient quantity of water for that purpose, it is not responsible in a suit for damages. This was held in the recent case of *Wallace v. Baltimore*, 123 Md. 638, where the opinion delivered by JUDGE CONSTABLE points out the distinction between the essentially corporate capacity in which a municipality furnishes water to its inhabitants at stipulated rates, and the public or governmental function it performs in supplying water gratuitously for the extinguishment of fires. In *Dillon on Municipal Corporations*, 5 ed., sec. 1627, it is said: "Unless there be a valid contract creating, or a statute declaring, the liability, a municipal corporation is not bound

to secure a perfect execution of its by-laws, relating to its public powers, and it is not responsible civilly for neglect of duty on the part of its officers in respect to their enforcement, although such neglect results in injuries to private persons which would otherwise not have happened." The next succeeding section of the same work illustrates the principle as follows: "A failure by the corporation to exercise its charter power to abate nuisances not rendering its streets unsafe does not give a person who is injured by such failure a private action against the corporation; and therefore where a house in a city was destroyed by fire caused by sparks from an engine on the adjoining property, which was by ordinance a nuisance that the city might have abated, but which after notice and request it had neglected to abate, the city is not liable in damages for such non-action and neglect, to the owner of the house destroyed."

In this State municipalities have been held legally responsible for injuries caused by dangerous street conditions which they had power under their charters to prevent or remove. This rule of liability has been enforced upon the theory that the grant of authority for such purposes created a corresponding duty and obligation to efficiently exercise the power. The language used in the opinions applying this principle to street obstructions and nuisances has occasionally been broad enough to include municipal duties generally, without reference to the distinction as to their corporate or governmental character, but in every instance in which the liability referred to has been enforced by this Court, the default or neglect related to a duty or an undertaking in reference to which the municipality had a proprietary or participating interest. The streets of an incorporated town or city being subject to direct and exclusive municipal control, it has been held that, with ample power to prevent and abate nuisances, the corporation was liable to suit for injuries caused by hazardous conditions which it negligently created or permitted to exist in its public thoroughfares, except in the

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cases in which the City of Baltimore has been relieved of that responsibility by the transfer of its police force to a separate governing authority. This general theory led to the enforcement of liability against the defendant municipality in *Baltimore v. Marriott*, 9 Md. 160, where a pedestrian was injured by an accumulation of ice on a sidewalk; in *Baltimore v. Pendleton*, 15 Md. 12, where a horse fell into an excavation in the street; in *Taylor v. Cumberland*, 64 Md. 68, where coasting on the street, which had been practiced to such an extent as to become a nuisance, was the cause of injury to a person who was in the act of crossing the street; in *Cochrane v. Frostburg*, 81 Md. 54, where the plaintiff was attacked and trampled by a cow, which, like numbers of other cattle, had been allowed to run at large on the streets; in *Hagerstown v. Klotz*, 93 Md. 437, where a person was knocked down on the street by a bicycle propelled, as customarily permitted, at an immoderate speed; in *Baltimore v. Beck*, *supra*, where the accident was due to the failure to light the street; in *Havre de Grace v. Fletcher*, 112 Md. 562, where a pedestrian was injured by the falling of a stack of beer kegs which had been allowed to remain in a dangerous position immediately adjacent to a footway; in *Annapolis v. Stallings*, 125 Md. 343, and *Keen v. Havre de Grace*, 93 Md. 34, where the injuries were due to the non-repair of street pavements; and in *Commissioners of Delmar v. Venables*, 125 Md. 471, where a wagon was overturned by a stump left in the roadway. In such instances the liability of the municipal corporations is sustainable upon the basis of their proprietary interest in the thoroughfares which they are empowered to maintain and keep safe for travel. The same liability attaches also in cases of injuries to person or property resulting from negligence or trespass in the performance of work undertaken by a city or town through its employees or contractors. *Cumberland v. Willison*, 50 Md. 138; *Frostburg v. Dufty*, 70 Md. 47; *Hitchins v. Frostburg*, 68 Md. 100; *Baltimore v. Walker*, 98 Md. 637; *Mc-*

*Carthy v. Clark*, 115 Md. 454; *Thillman v. Baltimore*, 111 Md. 131; *Kurrie v. Baltimore*, 113 Md. 63; *Hanrahan v. Baltimore*, 114 Md. 517; *Baltimore v. Schnitker*, 84 Md. 43; *Cahill v. Baltimore*, 93 Md. 233; *Guest v. Church Hill*, 90 Md. 689; *Baltimore v. O'Donnell*, 53 Md. 110.

The considerations which governed the cases we have cited do not have the same application to the function of regulating the transshipment of explosives in a locality which is not shown to have an unsuitable relation, for that purpose, to a highway or other public place under the City's control. If every grant of authority to such a corporation to provide by ordinance against danger to person or property were to be treated as a ground and measure of liability to suit for the non-exercise of the authority to the full extent to which it is conferred, the consequences of such a comprehensive rule of liability would be exceedingly onerous and often unjust. The decisions dealing with such questions recognize the difficulty of drawing a clear and definite line of distinction between municipal duties and powers which are to be regarded as governmental, and those which should be described as corporate in their character, but, with respect to such a situation as the one disclosed in the declaration filed in this suit, we can have no doubt that the asserted duty should properly be included in the former class, and its non-performance held to be an insufficient ground upon which to require the city to respond to a suit for damages.

This was the conclusion announced by JUDGE ROSE in an admiralty proceeding against the City of Baltimore and other defendants growing out of the very accident which gave rise to the present suit (*Zywicki v. Jos. R. Foard Co. et al.*, 206 Fed. 975), and it was also the view taken by that learned judge, and, on appeal from his decision, by the United States Circuit Court of Appeals, for the Fourth Circuit, in *State, use of Goralski, et al. v. Jos. R. Foard Co. et al.*, 213 Fed. 51, and 219 Fed. 827, in which a number of other claims for injuries resulting from this same explosion, were tried

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and determined in admiralty. In the first of the cases just cited the charge of negligence against the city was similar to that set forth in the present declaration, while in the latter cases the negligence was alleged to consist in the designation by the city of an improper place for the stationing of the vessel to receive the cargo, and in its not having properly supervised the work of loading the dynamite where an explosion would probably be destructive to life and property. These positions were held to be untenable in view of the governmental nature of the duty.

The distinction between corporate and governmental powers and duties of municipalities is discussed in notes to the cases of *Barron v. Detroit* (Mich.), in 19 L. R. A. (N. S.) 452, and *Dickinson v. Boston* (188 Mass. 595) in 1 L. R. A. (N. S.) 665. Some of the later decisions on the subject are: *Bisbing v. Asbury Park* (N. J.), 78 Atl. 196; *City of Indianapolis v. Williams* (Ind.), 108 N. E. 387; *Salmon v. Kansas City* (Mo.), 145 S. W. 28; *City of Radford v. Clark* (Va.), 73 S. E. 574; *Hines v. City of Nevada* (Iowa), 130 N. W. 181; *Hull v. Town of Roxboro* (N. C.), 55 S. E. 351.

In the view we have taken of the case at bar we do not find it necessary to consider the charter provision, cited in argument, exempting the City of Baltimore from liability for any unsafe conditions in the Patapsco River or its tributaries except in regard to such as may occur at the docks or wharves owned by the Mayor and City Council.

*Judgment affirmed, with costs.*

DUDLEY W. COPPAGE AND W. ROSS COPPAGE,  
EXECUTORS OF WM. S. COPPAGE,

*vs.*

J. CAMILLUS HOWARD.

*Real estate broker: commissions; must disclose name of purchaser. Prayers: inconsistent with facts. Misleading prayers.*

To entitle a broker employed to sell or find a purchaser of real estate to recover commissions, where no contract of sale is executed by his employer and the purchaser, he must show not only that he procured a person who was ready, willing and able to purchase the property upon the terms authorized by the vendor, but also that his employer was advised of that fact and given an opportunity to complete the sale to the proposed purchaser, and that it was because of the default of the vendor that the sale was not consummated. pp. 522-523

In general, the mere fact that the broker finds a willing and capable purchaser is not sufficient to entitle him to commissions, unless his employer is given the opportunity of profiting thereby. p. 523

A broker who fails or refuses to disclose the name of the purchaser he has procured, can not recover commissions, as for having made a sale. p. 525

A broker employed to sell real estate occupies a *quasi-fiduciary* relation, and must disclose all material facts which might influence the employer. p. 523

A contract of sale signed by one as attorney may render him personally liable, but does not bind the undisclosed principal. p. 524

Every prayer should be framed with reference to the facts of the particular case. p. 525

Prayers calculated to mislead the jury are improper. p. 525

*Decided January 14th, 1916.*

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Appeal from the Circuit Court for St. Mary's County.  
(BEALL and CAMALIER, JJ.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BURKE, THOMAS, URNER and STOCKBRIDGE, JJ.

*George Washington Williams* (with whom was *Combs & Loker* and *John Holt Richardson* on the brief), for the appellants.

*L. Allison Wilmer* (with a brief by *Wilmer & Ching*), for the appellee.

THOMAS, J., delivered the opinion of the Court.

This suit was brought by the appellee to recover commissions for services alleged to have been rendered the appellant in procuring a purchaser of certain property of the appellant situated in St. Mary's County, Maryland.

The appellant was the owner of three farms in St. Mary's County, and on the 14th of June, 1909, signed three contracts by which he authorized the appellee to sell the farms and agreed to pay him "a commission of five per centum out of the first payment on the gross amount of the sale," with the express understanding that the appellant was to "incur no expense in the transaction" unless the sale was made. Three contracts were signed because there were three farms. and there is some confusion in these contracts, *as they are printed in the record*, in regard to the price at which the property was to be sold, but that confusion seems to be accounted for by the fact that while the clear understanding was that the appellant was to receive \$20,000.00 for the three properties, and that they were to be sold for that sum plus the commissions of the appellee, separate contracts, on printed forms furnished by the appellee, were desired in order to secure a description of each farm. It also appears from the con-

tracts that the terms of sale were to be all cash, or one-half cash and the balance to be secured by a mortgage on the properties, although there is also some apparent confusion in regard to that, growing out of the fact that there were three contracts and that the entire contracts are not set out in the record.

The plaintiff testified that in June, 1913, the defendant telephoned him that he wanted \$25,000.00 for the three farms, and that he would pay the commission of five per cent. on that sum if the sale was made for that price, and that he, the plaintiff, noted the change of price on the contracts and thereafter advertised the property for sale for \$25,000.00, and then said: "Finally, on April 23, 1914, I sold the three farms to Mr. W. Bernard Duke, of Baltimore City, for \$25,000.00, one-half to be paid in cash, as soon as the title could be searched and papers prepared, and the balance to be secured by a mortgage upon the property, to be paid in five years. At the time of making the sale to Mr. Duke in Baltimore City, Mr. Duke was present, with his attorney, Mr. E. McClure Rouzer; and he, Mr. Duke, directed his said attorney to prepare the contract of sale in his, Mr. Rouzer's, name, as attorney, and to sign the same as attorney. After the contract of sale had been prepared and signed, as directed by Mr. Duke, he gave it to me, with a certified check for \$500.00, to take to the defendant for his signature to the contract, and to deliver the check to the defendant." The contract referred to by the witness is as follows:

"This agreement, made this 23rd day of April, 1914, by and between W. S. Coppage, of Drayden, St. Mary's County, hereinafter called the Vendor, and E. McClure Rouzer, Attorney of Baltimore, Maryland, hereinafter called the Vendee, Witnesseth:

"That the said vendor does hereby bargain and sell unto the said vendee and the said vendee does hereby purchase from the said vendor the following property situate and lying in St. Mary's County, Maryland, property known as the Carthagina Farm, containing

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two hundred acres (200) more or less, property known as Cooper's Creek Farm, containing three hundred (300) acres more or less, and property known as St. George's Point Farm, containing two hundred and eighty-seven (287) acres, more or less, together with the improvements thereon and rights appurtenant thereto at and for the sum of twenty-five thousand dollars (\$25,000), of which five hundred dollars (\$500) have been paid prior to the signing hereof. The balance of said purchase money is to be paid as follows: Twelve thousand dollars (\$12,000) on or before the expiration of thirty (30) days from the date hereof, at which time a deed for the properties shall be executed at the vendee's expense by the vendor, which shall convey the property by a good and merchantable title to the vendee. At the time of the execution and delivery of the deed aforesaid the vendee shall give, and the vendor hereby agrees to accept a mortgage for the balance of said purchase money, to wit, twelve thousand and five hundred dollars (\$12,500) payable five years (5) after date with interest at six per cent. (6%), the said vendee to have the right to reduce or pay off said mortgage at any time at his option.

"Taxes, insurance and other charges to be paid or allowed for by the vendor to the date of transfer.

"Executed in duplicate.

"As witness our hands and seals the day and year first above written.

.....(Seal)

(Signed) E. McClure Rouzer, Atty. (Seal)

"J. C. Howard."

The plaintiff further testified: "I carried this contract of sale \* \* \* with the certified check for \$500.00 with me to the defendant's house, on one of his farms in St. Mary's County where he then was, on the Thursday or Friday following, and handed this contract to the defendant for his signature, exhibiting and tendering to him the check for \$500.00. I left him reading the contract of sale and went

into the yard; and when I returned he expressed himself delighted with the sale, and said everything was all right. He then went to his safe, or some place, to look for his deeds, as he said. After some search he said he could not find them, and that he would not sign the contract that day, as he wished to find his deeds first and to notify his children, or to talk to his children about it; but that he would be in Leonardtown the following Tuesday, when he would sign the contract and settle up. \* \* \* He was very much pleased that the sale had been finally made. The defendant came to Leonardtown the following Tuesday and said to me he would like to reserve the Carthagina Farm, and asked me if I could get it off for him. As Mr. Duke, the purchaser, was a friend of mine, I told him I thought I could do this for him. I telephoned to Baltimore, and they finally said they would let off the Carthagina Farm, as suggested, for \$6,000.00, making the price for the other two farms \$19,000.00. When the defendant next came to Leonardtown I told him they would let him off with the Carthagina Farm for \$6,000.00, and he then asked if I could not get him off with the whole deal, as his children were crazy for him to keep the farms, and that he would pay the full commission of \$1,250.00. I told him if he would do this I might be able to get him off. Afterwards he offered to pay me \$1,000.00, saying this would be proper commission after taking off Carthagina Farm; and after that he wanted to make it \$950.00. I then refused his offer, and he has never paid me a cent. This was the last conversation I had with him. On his first or second visit to Leonardtown, after I had presented the contract of sale to him for his signature, according to my recollection, I told him Mr. Rouzer was acting as attorney for Mr. W. Bernard Duke in purchasing the farm, and that Mr. Duke was the purchaser. After my last conversation with the defendant in Leonardtown I received a letter from Mr. Rouzer, Mr. Duke's attorney, dated May 19th, 1914, complaining of the delay in closing the deal; and I sent the defendant this letter, with a letter from me, dated May 20th, 1914; but he never

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returned the Rouzer letter to me as I requested. After that, early in June, 1914, I received a letter from the defendant saying that his farms were not for sale; and I promptly turned this letter over to my attorneys for their action." The letters referred to by the witness as having been sent to the defendant made no disclosure of the fact that Mr. Duke was the purchaser. On cross-examination the plaintiff testified "that he told the defendant who the purchaser was after he had made one or two visits to Leonardtown; that this was his recollection; that the defendant may have asked the name of the purchaser at the time the witness presented the contract of sale to him; that he does not recollect telling the defendant at the time who the purchaser was; that he did not think this was very important so long as the defendant was satisfied with the sale and was getting his price for the farms; that there might have been something said about a Connecticut man; that on previous occasions they had talked about people from Connecticut, from Cleveland and from elsewhere; that he did not know under what impression he left the defendant as to who the real purchaser was at the time he presented the contract of sale; that he did not know whether the defendant thought it was the Connecticut or Cleveland parties; \* \* \* that he did not know if Mr. Duke is now ready to take the property; that he never carried Mr. Duke to see the defendant, and never told the defendant to communicate with Mr. Duke, nor did he tell Mr. Duke to communicate with the defendant; that he did not remember how many times the defendant asked him who was the purchaser; that he did not think it important the defendant should know who the purchaser was so long as he was perfectly satisfied with the sale and got his money." He also stated that he made certain changes in the contracts showing that the price at which the property was to be sold was \$25,000.00, which he thought he had a right to do upon the authority of the defendant's letter of June 20th, 1909, authorizing him to make corrections, and on re-examination tes-

tified that after defendant told him in June, 1913, that he wanted \$25,000.00 for the three farms, he made a note of it on the three contracts, as stated in his cross-examination, and that he wrote nothing more and made no other change.

Mr. Duke testified: "I live in Baltimore City and am engaged in a number of enterprises. Mr. Howard, the plaintiff in this case, came to me perhaps a year before I become interested in the purchase of the Coppage farms in St. Mary's County, offering to sell me these farms. He showed me his three contracts with Mr. Coppage. I knew something about the farms, although I had not been on them for some years; so I went down, \* \* \* with Mr. Howard and looked them over before purchasing. Finally I agreed to purchase the three farms for \$25,000.00, according to the terms of the contracts of Mr. Coppage with Mr. Howard, and I instructed my attorney, Mr. E. McClure Rouzer, to prepare the contract of sale for Mr. Coppage's signature, which he did, according to my direction, and signed it as my attorney, by my direction. I had a certified check made for \$500.00 and delivered to Mr. Howard to be given to the defendant. I was ready, willing and able to comply with the terms of sale as stated in the contract. I directed Mr. Rouzer, as my attorney, to write the letter to Mr. Howard of May 19th, 1914, complaining of the delay, and was then and thereafter ready, willing and able to pay for this property. I was always ready, willing and able to buy this property and to pay for it, and did not give up the idea until a month or so ago when I determined I did not care to live in the country. I could have paid cash for it, but I told Mr. Howard it would be perfectly satisfactory to take it on mortgage for one-half, according to his agreement with Mr. Coppage. I did not deal directly with Mr. Coppage, and neither saw nor spoke to him in the matter; nor did my attorney, Mr. Rouzer; all our communications and dealings being with Mr. Howard, Mr. Coppage's agent. I had the title examined by a title company at my expense. I did not care to be known in the deal at that time, and so instructed my attorney to

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sign the contract of sale. Some years ago I instructed Mr. Howard, the plaintiff, with whom I have had a number of real estate transactions, not to disclose my name in making the deals. I did not give him any particular instructions in this case."

The defendant testified as follows: "I live in St. Mary's County and I am one of the judges of the Orphans' Court of St. Mary's County. I came to St. Mary's County in 1863. I remember the contract of sale signed by Mr. Rouzer which Mr. Howard, the plaintiff, handed to me to sign. Mr. Howard had called me up over the 'phone before that and said he had an offer of \$23,000.00 for the property. I told him I could not consider anything less than \$25,000.00. The terms of the contract of sale, as presented to me, were \$25,000.00, half cash, balance on mortgage to run for five years at 5% interest. I asked him who the purchaser was, and each time he said he did not know. I thought from what he said that they were parties from Connecticut. I refused then to sign the contract. When I came to Leonardtown the following Tuesday, it being by duty as Judge of the Orphans' Court to come to town every other Tuesday, Mr. Howard said to me he would report all off and no sale, as I told him on the day the contract was presented to me and on this Tuesday that I would not sign it. This is the last conversation we had as to the sale of the property. Later, when plaintiff made a claim for commissions, we talked about commissions and some matters of compromise, the plaintiff never told me the name of the purchaser, but led me to believe that it was somebody in Connecticut. I never knew Mr. Duke was the purchaser until today. Mr. Duke never communicated with me. I listed the property so long ago it got out of my mind about listing. I improved the property at a cost of from five to ten thousand dollars; built barns, houses and wire fences on the Cooper's Creek Farm. I would have taken \$25,000.00 cash. I don't think I put anything about mortgages in any of the agreements. I objected to the terms of the contract, not knowing who the

purchaser was, and to the 5% interest on the mortgage. As I did not like the terms of the sale and didn't know the purchaser, I wanted to speak to my children about it. I never accepted the terms of sale. When I signed the contracts of employment there was nothing in them as to one-half mortgage on the whole property, and I never put the words \$25,000.00' three contracts on any of the contracts." On cross-examination the defendant stated that he signed the three contracts of 1909, which were shown him, and filled in the blanks but that he did not think he wrote anything about mortgages "nor the figures and words 20,000, or 25,000, three tracts in any contract." He was also shown the contract of sale offered in evidence, and he stated that it looked like the one presented to him by the plaintiff, and when he was asked what reason he gave Mr. Howard for not signing the contracts of sale on the day it was presented to him he said it was because of the 5% interest and because he wanted to talk to his children about it first, but that he did not remember giving any other reason; that he wrote the letter referred to by the plaintiff stating that the farms were not for sale, but had no recollection of receiving the letter of the plaintiff of May 20th, 1914, enclosing a letter from Mr. Rouzer.

We have set out the evidence somewhat at length because the defendant offered a number of prayers for the purpose of withdrawing the case from the jury, all of which we think, for the reasons hereinafter stated, were properly rejected.

It is important to bear in mind that the claim in this case is not for commissions on the consideration of a sale actually made, but for commissions claimed to have been earned in the performance of a contract authorizing the plaintiff to sell or to procure a purchaser for the property. In the case of *Riggs v. Turnbull*, 105 Md. 135, where the Court held that "a real estate broker is not entitled to recover from a vendor commissions for making a sale of property, if the purchaser produced by him fails or refuses to pay the entire purchase money, although a binding contract of sale was

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executed by the vendor and purchaser," JUDGE PEARCE had occasion to review some of the decisions in this State, and observed. "In *Keener v. Harrod*, 2 Md. 70, the Court said: 'The legal import of an agreement to procure a purchaser, binds the party to name a person who ultimately *buys* the property,' as was held in *Murray v. Currie*, 32 Eng. Com. Law, 641, cited by the Court in support of its language. In *Kimberly v. Henderson and Lupton*, 29 Md. 515, the Court said: 'To be entitled to their commissions as brokers they should have completed the sale, that is they should have found a purchaser in a situation, and ready and willing to complete the purchase according to the terms agreed upon. The undertaking to procure a purchaser required of the party so undertaking, to produce a party *capable* and who ultimately becomes the purchaser. These propositions are settled in *Keener v. Harrod and Brooke*, 2 Md. 63, and *McGavock v. Woodlief*, 20 How. 221.' " He also quoted the statement of the Supreme Court in the case of *McGavock v. Woodlief*, 20 How. 229, cited by JUDGE ALVEY in *Kimberley v. Henderson*, *supra*: "The broker must complete the sale; that is he must find a purchaser *in a situation, and ready and willing to complete the purchase* on the terms agreed on, before he is entitled to his commissions. Then he will be entitled to them, though the vendor refuse to go on and perfect the sale." In *Schwartz v. Yearly*, 31 Md. 270, JUDGE ROBINSON said: "If there were a special contract, by which the appellee was not to receive any compensation, unless the property was sold at a stated price, he was not entitled to recover, unless the property was sold at that price, or unless he introduced a purchaser who was willing to buy, and was prevented from making the sale by the fault of the defendant." In the case of *Walker v. Baldwin & Frick*, 106 Md. 619, the Court said: "All the cases agree that the disclosure of the purchaser's name and the putting of him in communication with the defendant, by the plaintiff must be not only the foundation upon which the negotiation was begun, but upon which it was *conducted* and the sale ulti-

mately made. *Keener v. Harrod*, 2 Md. 71; *Hollyday v. Southern Agency*, 100 Md. 296. The broker must be shown to be the *procuring cause* of the sale. The intervention of the plaintiff in beginning the negotiations, and their subsequent culmination in a sale will not suffice unless *those negotiations* were the ultimate cause of the sale," and this language in *Walker's case* was quoted by the Court in the later case of *Martien v. Baltimore City*, 109 Md. 260. It is said in 19 *Cyc.* 246: "A broker employed to find a purchaser is not entitled to a commission where no sale is made, unless the purchaser, is able, ready and willing to take the property upon the terms specified by the principal. Upon producing such a person the broker becomes entitled to a commission whether or not a sale is consummated," and on page 258 of the same authority we find the statement, "If a broker who has found a customer does not take a binding contract from him, he must introduce the customer to the principal, else he is not entitled to compensation. \* \* \* The broker must bring the parties together." By the Act of 1910, Ch. 178, sec. 17, Art. 2 of the Code (p. 5) it is provided: "Whenever, in the absence of an agreement to the contrary, a real estate broker employed to sell \* \* \* real or leasehold estates, \* \* \* procures in good faith a purchaser, \* \* \* and the person so procured is accepted as such by the employer, and enters into a valid, binding and enforceable written contract of sale, purchase, etc., \* \* \* in terms acceptable to the employer and signed by him, the broker shall be deemed to have earned his customary or agreed commission, \* \* \* unless the performance of such contract is hindered or delayed by any act of the broker."

It is clear upon the authorities referred to that to entitle a broker employed to sell or to find a purchaser of real estate to recover commissions, where no contract of sale is executed by his employer and the purchaser, it is incumbent upon him to show not only that he *procured* a person who was ready, willing and able to purchase the property upon the terms authorized by his employer, but also that his employer was

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advised of that fact and given an opportunity to complete the sale to the proposed purchaser, and that the sale was not consummated because of his employer's default. The mere fact that the broker *found* a willing and capable purchaser is not enough. It is obvious that he is not entitled to compensation for such services unless his employer is afforded an opportunity to receive the benefits of them.

Now the evidence shows that the purchaser procured by the plaintiff was Mr. Duke, who, it appears from the evidence, was ready and willing and capable of buying the property upon the terms the appellant agreed to sell it. But according to the evidence produced by the defendant he never knew until the day of the trial that Mr. Duke was the real purchaser, and he states that each time he asked the plaintiff who the purchaser was he said he did not know, and left him under the impression that they were parties from Connecticut. The only person that he was advised of as being the purchaser was Mr. Rouzer, who signed the proposed contract of sale as attorney, and there is no evidence in the case to show that Mr. Rouzer was capable of buying the property. But, apart from that, under the terms of the proposed sale, the defendant was required to take a mortgage for one-half of the purchase money, payable five years after date. Under such circumstances the defendant was clearly entitled to know who the purchaser was. A broker employed to sell real estate occupies a *quasi fiduciary* relation to his employer, and in his dealings with him is bound to act in good faith and to make disclosures of matters that are material and might affect the action of his employer in the premises. This principle is fully recognized in this State. *Raisin v. Clark*, 41 Md. 158; *Blake v. Stump*, 73 Md. 160; *Hambleton v. Rhind*, 84 Md. 456. It is said in 23 *Am. & Eng. Ency. of Law* (2nd ed.), 921: "Where the broker does not disclose the name of the purchaser the owner may refuse to sell without being liable for commissions, as he is entitled, in such case, to act upon the supposition that the broker him-

self is the proposed purchaser"; and in the case of *Gerding v. Haskin*, 141 N. Y. 514, 36 N. E. 601, the Court said: "Before a real estate broker can recover his compensation, he is bound to prove that he found a purchaser and produced him to his principal, ready and willing to purchase the real estate upon his terms." See also *Wylie v. Marine Nat. Bank*, 61 N. Y. 416; *Hayden v. Grillo*, 26 Mo. App. 289; *Hayden v. Grillo*, 35 Mo. App. 647; *Veasey v. Carson*, 177 Mass. 117; *Young v. Hughes*, 32 N. J. Eq. 372; *Pratt v. Patterson*, 112 Pa. St. 475; *Wilkinson v. McCullough*, 196 Pa. St. 205. The appellee cites the statement in 23 *Am. & Eng. Ency. of Law*, 923: "While the owner is entitled to know the name of the purchaser, and it has been asserted that so long as there is uncertainty as to the purchaser the broker can not claim performance of a contract and demand his compensation, it has also been held that the failure of the broker to disclose the name of the purchaser is not such a breach of good faith as will deprive him of the right to commissions, unless such information is material to the owner and might affect his action in the premises." But the cases cited in the note in support of the text hold that where the vendor, by reason of the terms of the sale, by which only part of the purchase money is paid in cash, is interested in the financial responsibility of the purchaser, it is the duty of the broker to disclose the name of the purchaser. *Veasey v. Carson*, *supra*, 58 N. E. 177. Mr. Rouzer would have been personally liable upon the contract of sale tendered to the defendant (*Manning v. Embert*, 126 Md. 544), but in order to bind his principal the contract should have been executed in his name in pursuance of an authority under seal to do so. 1 *Poe P. & P.*, sec. 358; *Citizens' F. Ins. & Land Co. v. Doll*, 35 Md. 89; *Wanamaker v. Bowes*, 36 Md. 55.

If the evidence produced by the defendant was believed by the jury, then their verdict should have been for the defendant, and the defendant was entitled to instructions presenting his theory of the case. On the other hand, the plain-

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tiff testified that he told the defendant that Mr. Duke was the purchaser. If the jury accepted that view of the case, and found that the defendant with that knowledge refused to consummate the sale to him, then the plaintiff was entitled to recover.

The plaintiff's first prayer instructed the jury that if they found that the plaintiff "*procured* a purchaser" who was ready, willing and able to pay for the property, and that he notified the defendant of that fact and the defendant refused to consummate the sale, their verdict should be for the plaintiff. Every prayer should be framed with reference to the facts of the particular case, and, for the reasons stated, we think that this prayer was calculated to mislead the jury. Unless the defendant was advised who the purchaser was, and was thereby given an opportunity to consummate the sale to him, the plaintiff was not entitled to recover. This prayer was also in conflict with the defendant's ninth prayer, which was granted and which instructed the jury that if the plaintiff did not disclose the name of the real purchaser or put the defendant in communication with him, their verdict should be for the defendant. We think the modification of the defendant's ninth prayer was also calculated to mislead the jury. If the plaintiff did not disclose the name of the real purchaser or put the defendant in communication with him, the jury would not have been warranted, upon the evidence in this case, in finding that the failure of the defendant to consummate the sale was occasioned by his own fault. We find no error in the ruling of the Court on the other prayers referred to in the plaintiff's fourth exception.

At the conclusion of the testimony, the defendant moved the Court to strike out the evidence of the contract signed by Mr. Rouzer, which had been admitted by the Court subject to exception. While, for the reasons stated, the defendant was under no obligation to sign that contract, we think the contract, in connection with the testimony of the plain-

tiff and Mr. Duke, was evidence of the terms upon which the latter agreed to purchase the property, and therefore admissible for that purpose. There was no error in the rulings on the evidence referred to in the other exceptions. The plaintiff testified that he made no changes in the contracts between him and the defendant except to note thereon the change in the price at which the properties were to be sold.

The declaration is free from the objections urged by the appellant, and the demurrer was, therefore, properly overruled. While the allegations are that the plaintiff *procured* a purchaser of the property, the declaration also avers that the defendant refused to consummate a sale to the purchaser procured by the plaintiff. While we have said that the word *procured*, as used in the plaintiff's first prayer, was, in view of the evidence in the case, misleading, we think the declaration should be construed as averring that the plaintiff procured a purchaser, etc., and that the defendant refused to make the sale to *him*, which implies that the defendant was advised who the purchaser was.

By reason of the errors pointed out in the rulings in the fourth exception, the judgment of the Court below must be reversed and the case remanded for a new trial.

*Judgment reversed, with costs to the appellant, and a new trial awarded.*

Md.]

Syllabus.

R. B. TIPPETT &amp; BRO.

vs.

OLIVIA R. MYERS.

*Partnerships: individual liability; not for torts beyond scope of business; attorneys-at-law; investments for clients; fraud; proof.*

A plea not denying the partnership alleged in a declaration, admits the partnership only, and does not admit that the transaction sued on was within the partnership scope. p. 531

The statute suspending the running of limitations when the plaintiff has been kept in ignorance of his cause of action by the defendant's fraud, does not apply against a partner who has been guilty of no fraud or wrongdoing in the transaction.

p. 532

A member of a law firm, not engaged in the business of investing moneys for clients, is not responsible for the acts of a co-partner in making an investment, which does not appear on the firm books and of which he has no knowledge. pp. 534-535

It was error to permit the plaintiff (who had brought suit for moneys lost by an attorney to whom she had entrusted them for investment) to testify what she *thought* was his law partner's connection with the transaction. p. 535

An attorney, with general authority to invest, who invested eight hundred dollars of his client's money and seven hundred dollars of his own money in a loan, taking therefor one promissory note for fifteen hundred dollars secured by speculative

## Syllabus.

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stock, and receiving no compensation from his client for the investment, was not necessarily guilty of fraud for making an undisclosed arrangement with the borrower by which the attorney was to receive a percentage of any prospective enhancement in the value of the stock, when this undisclosed prospective profit could only have been received after repayment of his client's money. pp. 537-538

A client who, in such case, knew shortly after the loan was made, over six years before the institution of the suit, what the character of the security was, and that the stock certificate was in the lawyer's name, and who finally severed relations with her counsel nearly four years before the institution of the suit, and failed to make any inquiry as to the circumstances of the transaction, did not exercise the usual and ordinary diligence necessary to suspend the running of limitations where ignorance of the cause of action is relied on for such suspension.

p. 538

*Decided January 14th, 1916.*

Appeal from the Baltimore City Court. (GORTER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BURKE, THOMAS, URNER and STOCKBRIDGE, JJ.

*Eugene O'Dunne and George W. Lindsay* (with whom was *Donald B. Creecy* on the brief), for the appellants.

*Laurie H. Riggs and J. Marsh Matthews*, for the appellee.

BOYD, C. J., delivered the opinion of the Court.

The appellee sued the appellants in assumpsit on the common counts and attached to the declaration there was an account as follows:

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## Opinion of the Court.

"Baltimore, Md., July 10, 1914.

"Richard B. Tippet and James E. Tippet, co-partners trading as R. B. Tippet & Bro.,

To Olivia R. Myers, Dr.

"May 11, 1908. To Cash collected and retained. . . . . \$800.00

"To interest on same from October 1, 1909 (the interest on said sum having been paid to that time) to date."

The record states that annexed to the declaration was an affidavit under the Act of 1886, Chapter 184, which with amendments is the Practice Act of Baltimore City, Sec. 312, etc., of Art. 4 of Public Local Laws. The defendants plead, separately, the pleas of never indebted, never promised and limitations. The plaintiff joined issue on the first and second pleas and replied to the third, alleging fraud. The defendants filed rejoinders to the replications to their pleas and issues were joined. The trial resulted in a verdict for plaintiff for \$800.00, and this appeal was taken from the judgment rendered thereon.

There are nine bills of exceptions presenting rulings on the evidence, and a tenth containing the rulings on the prayers. The plaintiff offered six prayers—the first and fourth of which were granted and the others rejected. R. B. Tippet offered five and J. E. Tippet four, separately, and they offered one jointly which is marked defendants' sixth prayer, all of which were rejected.

We will first consider the prayers. The plaintiff's first is as follows: "The plaintiff prays the Court to instruct the jury that the partnership of the defendants, Richard B. Tippet and James E. Tippet, having been alleged in the declaration filed by the plaintiff, and not having been denied by the next succeeding pleading of the defendants, or either of them, said partnership is admitted for the purpose of this cause." As the suit was brought under the Practice Act in force in Baltimore City, the prayer ought to have referred

to the affidavit as well as to the declaration, as the statute so requires in order to put the defendant in default in not pleading, etc., but apparently in drawing it the plaintiff had in mind the general law, Article 75, Sec. 24, sub-sec. 108, of the Code of Public General Laws. The affidavits are not in the record, but if those of the defendants stated what is required by the local law, it would not have been necessary to have had pleas denying the partnership. *Farmers, etc., Bank v. Hunter*, 97 Md. 148; *Horner v. Plumley*, *Ibid.* 271. But regardless of that technical question, in our judgment the prayer was not proper under the facts of this case, notwithstanding it uses the language of the statute that "said partnership is admitted for the purpose of this cause." The attorneys for the appellee seem to be of the opinion that the prayer contained all that is required, but we do not so understand the meaning of that expression. In *Fifer v. Clearfield Coal Co.*, 103 Md. 1, the suit was not brought under the local law, and the Court passed on the meaning of Article 75, Sec. 24, sub-sec. 108, which provides that "Whenever the partnership of any parties, or the incorporation of any alleged corporation, or the execution of any written instrument filed in the case is alleged in the pleadings in any action or matter at law, the same shall be taken as admitted for the purpose of said action or matter, unless the same shall be denied by the next succeeding pleading of the opposite party or parties." The *narr.* alleged that the appellant "entered into a written contract with the said defendant, by said Rogers, Holloway & Co., the agents of the said defendant, who were then and there \* \* \* duly authorized by said defendant to execute said contract in its behalf." The written contract was then set out *verbatim* in the declaration, and the appellant contended that as it had not been denied by the appellee by its next succeeding pleading, it must be taken as admitted for the purpose of the action as well as the agency of Rogers, Holloway & Co. This Court said, "Such a construction, however, is broader than that warranted by the

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terms of the statute, which are \* \* \* (quoting the statute). The words 'the same shall be taken as admitted for the purpose of said action or matter' refer to the allegations of 'partnership of any parties,' 'the incorporation of any alleged corporation,' and 'the execution of any written instrument' alleged in the pleadings. The failure to deny any of these in the next succeeding pleading operates as an admission against the opposite party." Then after quoting from *Banks v. McCosker*, 82 Md. 525, at some length, the Court said: "The failure of the appellee to make denial of the execution of the contract as set out in the declaration, had the effect only of relieving the appellant of proving it, but it did not admit that Rogers, Holloway & Co. were the agents of the appellants with authority to bind them as charged in the *narr.* That was put in issue by the pleas, and was open for proof as any other fact that had been alleged."

So in this case the fact that the defendants were partners is admitted, but does not admit that the suit was on a partnership transaction, or that what one partner did in reference to it necessarily bound the other. The defendants could not truthfully have sworn that they know, or had good reason to believe such allegation of co-partnership to be untrue as the Practice Act provides. The failure to deny the partnership had the effect only of relieving the appellee of proving it, to follow the language used in *Fifer's case*. Surely if this Court was right in that case, where the declaration expressly alleged that the written contract was entered into with the appellee by Rogers, Holloway & Co., the agents duly authorized by them to execute it, in saying that their failure to deny the execution did not admit that these parties were the agents with authority to bind them, the failure to deny the partnership could not take from these defendants the right to prove that it was not a partnership transaction. The case of *Whitman, et al., v. Wood*, 6 Wis. 676, is quite analagous, but we need not further refer to it. The prayer as granted was misleading, even if the lower Court did not intend to go as far

as the appellee now contends is the result of the failure to deny the partnership, and there was error in granting it—particularly as no other prayer was granted which limited or explained its meaning. The plaintiff's fourth prayer was also defective, if for no other reason from the fact that it entirely omitted all reference to the ten dollars which the plaintiff received from James E. Tippet, which had been paid him by Mr. Yardley. It said nothing about the stock which the appellee still holds, and which so far as the record shows may still have some value, but in view of the conclusion reached by us in reference to the defendant's first prayer, it would serve no good purpose to discuss that.

The first prayer offered by Richard B. Tippet was as follows: "The defendant, Richard B. Tippet, prays the Court to instruct the jury that under the pleadings there is no evidence in this case legally sufficient to entitle the plaintiff to recover against this defendant, and therefore the verdict of the jury must be for the defendant."

In our judgment that prayer should have been granted. In the first place, the statute of limitations was a complete bar to the action against him unless the plaintiff was kept in ignorance by the fraud of the defendant. The replication to that plea alleges that the plaintiff "was kept in ignorance by the fraud of the said defendant for a long time of the cause of action which she had against the said defendant, and that she brought this action within three years from the time at which she could by usual and ordinary diligence have discovered the fraud." There is no evidence whatever of any fraud on the part of Richard B. Tippet—even if there was on the part of James E. Tippet, which we will consider later, yet the replication alleges that she was kept in ignorance "by the fraud of the said defendant"—it being a reply to the separate plea of Richard B. Tippet. The uncontradicted evidence shows that he did not know of the transaction between James E. Tippet and R. T. Yardley for more than two years afterwards, when he was told of it by the plaintiff

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herself. The plaintiff testified that when she spoke to R. B. Tippet, he said he never heard of it, and when she told him "about the matter he scolded her very much for entering into such speculation." She said he suggested that she write a letter to J. E. Tippet, which she did. That was sometime in the fall of 1910—the letter is dated October 22, 1910. In that letter she wrote, "First, in regard to the Yardley loan. I must ask you to have this matter settled immediately. A rather prominent lawyer to whom I mentioned this loan, after he has heard that in the first place, said, you should never have allowed me to consider this loan for a moment, but that as long as it has been made it was your duty as my lawyer, to safeguard my interests as much as possible and see that I had ample security." (Something seems to have been omitted in first part of this paragraph.) Again she said, "I wish to know what value, if any, the stock has: under the circumstances *I shall hold you personally responsible for the loan.*" She said the prominent attorney referred to was Mr. Richard B. Tippet himself, and that the letter was written "at his instigation." He testified that he never saw the letter, and if he advised her to write one at all it was provided she could not see James E. Tippet in person and ask him about the matter, but he added, "I have no doubt she wrote that letter after having talked with me, because she wrote it feeling and very likely expressing, to some extent, my feeling about the matter. That is why I suppose she wrote the letter. I had nothing to do with the transaction when it was made. James E. Tippet and I were in partnership at the time of this particular transaction, when this transaction was made, but we were partners practising law, and I was not in partnership with him or anybody else loaning money on mining stocks or buying stocks, and I knew nothing of the transaction until Miss Myers told me about it at the time I have mentioned." He had already said, in speaking of the interview with the plaintiff, "I think she has expressed about what I said at the time. I told her

that she had no right to invest her money in mining stocks, and that if she had ever consulted me about it, she would never have done so. I knew nothing about the value of the mining stock, but I did not consider that she had any right to invest in it, and that I would never have advised her to invest any money in mining stock." Sometime later—Mr. R. B. Tippet said it was in 1912, and apparently the plaintiff corroborates that, as she introduced a letter from him to her dated March 23, 1912—he went to see James E. Tippet about the matter at the request of the plaintiff. He said he told her that he did not like to do so, as it was a delicate matter for him. He testified that he said to James E. Tippet, "I would like you to go see Yardley and see if you can not get Yardley to pay off his interest and see if you can not get him also to pay the interest or secure the principal satisfactorily to Miss Myers," and he told him he would do so. That was considerably over a year after James E. Tippet had given her all of her papers and said he would act for her no longer. There was certainly nothing in any of those transactions which suggested fraud on the part of Richard B. Tippet, and he did what most attorneys would do, endeavored to help the daughter of a former client, who herself had also been his client, especially as his brother had made the loan, which he deemed an unwise one.

That would be sufficient to prevent recovery against Richard B. Tippet, but we think that under the evidence and the law he cannot be held as a partner in this transaction. There is nothing whatever to show that it was a partnership transaction beyond the mere fact that they were partners in the practice of law. It is not shown that the transaction in any way passed through the books of the firm, or that R. B. Tippet was in any way connected with it, or even knew of it. Miss Myers' father died in 1897 and R. B. Tippet assisted her in settling his estate. For several years he attended to her business, made investments of money then received by her, &c. At the end of several years R. B. Tippet

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## Opinion of the Court.

sent her to James E. Tippet, and from that day on the latter had all the investing of her money, although she says she thought that it was under R. B. Tippet's cognizance. There is nothing in the record to justify her in so thinking, but on the contrary for about eight years, up to the time of this transaction, James E. Tippet had attended to her investments, so far as either of the Tippetts did, had collected interest for her, and remitted it in his own name. As we have seen, as late as October 22nd, 1910, she wrote to him "under the circumstances I shall hold you personally responsible for the loan"—referring to the loan in question in this case. That letter is also in other respects utterly inconsistent with any idea on her part at that time of attempting to hold R. B. Tippet. Not only that, but she went to him to ask him to see his brother, she gave her receipt for the stock to James E. Tippet, the stock she received was in his name, and whenever she wrote she wrote to him and not to R. B. Tippet & Bro., although she says James E. wrote to her on paper that had the letter head of the firm on it. She did not even mention the Yardley loan to R. B. Tippet for more than two years after it was made, although she had been having trouble in getting the interest. Both R. B. and J. E. Tippet swore that the former had nothing to do with the loan, and there is no evidence offered by the plaintiff to show that he did—only what she said she thought, which is not evidence. Although we will not discuss the exceptions to the rulings on testimony, it may be well to say in passing that there was error in permitting the witness to answer the question embraced in the ninth exception when she was allowed to say what she thought about R. B. Tippet's connection with the business. Showing that R. B. Tippet was her attorney in the matter of examining a title to property in Montgomery County in 1910 confirms rather than weakens our conclusion. It shows that when she wanted him she went to him and employed him, but because he was attorney in that, or possibly other transactions, would not make him responsible for what James E. Tippet did in matters wholly

outside of the partnership. If a firm of attorneys is to be responsible for every act of each partner, whether concerning legal or other matters, then the liability of attorneys as partners is greater than that of any other partners. Of course if a firm undertakes to make loans, collect the interest and remit it, &c., the partners may be liable in such transactions, but that is not this case. Beyond all that, she is now in Court attempting to remove the bar of the statute of limitations on the ground that J. E. Tippet was personally interested in the loan. If he was acting for himself and not for her, why should R. B. Tippet be held liable? Without prolonging this opinion by further reference to the evidence, we are convinced that the first prayer of R. B. Tippet should have been granted on both of the grounds which we have mentioned—that the statute of limitations is a bar to recovery, and that this was not a partnership transaction.

Coming then to the question whether the first prayer of James E. Tippet should have been rejected. That uses the same language as the one offered by R. B. Tippet. After giving the question full consideration, we have reached the conclusion that it should also have been granted. If there was fraud on the part of James E. Tippet the plaintiff undoubtedly “could by usual and ordinary diligence have discovered” it more than three years before she brought this suit, which was instituted on July 11th, 1914. She knew on May 11th, 1908, that he had made the loan to Mr. Yardley, and she testified that the latter part of May or first of June, she went to the office of Mr. James E. Tippet and he gave her the stock, which was issued *in his name*, and when she received it, it was not endorsed. Her receipt for the stock is dated June 25, 1908—so at least as early as then she knew the stock was in his name and it was not endorsed until after the letter of October 22, 1910, when she called upon him, but she then had had possession of the certificates for over two years. In that interview he said he wanted nothing more to do with her affairs and turned over to her “all mortgages, deeds and everything of that sort” he had of hers, and she

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received a note of Mr. Yardley for \$848.00, principal and one year's interest, in a letter from James E. Tippet, dated November 5, 1910. That was apparently the last communication from him to her. As we have seen, she wrote to him on October 22, 1910, that she would hold him personally responsible for the loan. She therefore knew in 1910, nearly four years before the suit was brought, everything she now knows, excepting, "it was in the fall of 1912 that she first heard that Mr. James E. Tippet had any interest in the stock, and she found that out through inquiries of Mr. Yardley by her counsel, Mr. Riggs." But when she saw the stock was in his name she certainly might with usual and ordinary diligence have known or discovered what she now relies on, and certainly after he had refused to longer represent her—latter part of October or early in November, 1910—she could have had other counsel, as she subsequently did, and if she is right in her contention that it is evidence of fraud, she had sufficient knowledge to put her on inquiry.

It is only just to Mr. Tippet to say that he testified that he explained to her the transaction at the time—told her that he had put \$800.00 of *her* money and \$700.00 of *his* in the loan of \$1,500.00 to Mr. Yardley. The fact is that he had done so, and he turned all of the stock over to her, giving her \$800.00 priority over his \$700.00. His interest in the stock to the extent of the \$700.00 loan certainly did not injuriously affect her, as she not only had all of the stock to look to, but he was personally interested in having her paid. in order that he might get his own back. But she claims that she did not know that he was to get one-third of the profits in case of sale. It was, of course, only possible to have profits after her claim was first paid, and then his \$700.00, and we confess it is not easy to see fraud in that. even if he did not tell her, as we must assume in passing on the prayer. She knew that she was not paying anything for his services, that he had even turned over to her the \$10.00 he had received as a bonus, and it is going pretty far

to say that it would be fraudulent for a broker or attorney to rely on profits for his compensation in case of sale, even if he did not tell his principal that he had such interest in it. It is not pretended that he told her he had no interest in the stock and she does not say she inquired of him why the stock was in his name. The certificates were dated in 1906, and it is, to say the least, remarkable that if he did not explain the matter to her, as he says he did, why she did not inquire what those facts meant. It will hardly do to say she did not know enough about business for she asked for the note and she noticed that he had not endorsed the certificates, which Mr. Tippet says was an oversight on his part. The transaction certainly shows that James E. Tippet had confidence in the stock, when he put nearly as much in the loan as the plaintiff had in it—in addition to relying on some profits on it for his compensation. It is therefore very questionable whether it can be said that there was any evidence of fraud, assuming all the plaintiff says to be true, but regardless of that we think the record abundantly shows that she might have discovered or known what she now calls fraud with usual or ordinary diligence, and hence as a matter of law, under the pleadings, she can not recover. In *Stieff Co. v. Ullrich*, 110 Md. 629, we quoted with approval what was said in *Foster v. Railroad*, 146 U. S. 88, that “the defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove. Hence the tendency of Courts in recent years has been to hold the plaintiff to rigid compliance with the law which demands not only that he shall be ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts.” We are not unmindful of the rule that such a question in actions at law is usually for the jury, but where a plaintiff's own evidence shows that she had such knowledge as this plaintiff had, the Court is called upon to pass upon its legal sufficiency to meet the requirements of the statute, and to say whether she could

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by usual and ordinary diligence have discovered the fraud, if there was any, more than three years before the suit was brought. Nor do we overlook the importance of holding attorneys and agents to strict accountability, but they are entitled to the protection which the law affords them, as well as others, against unwarranted charges of fraud. So we are of the opinion that the first prayer offered by James E. Tippet should have been granted.

That relieves us of the necessity of discussing the other prayers or the exceptions to the rulings on the testimony. We have not deemed it necessary to determine the question whether this form of action was the correct one under the circumstances, as that would involve the further question whether under the Act of 1914, Chapter 110, Sec. 9A of Art. 5, we could consider it under this prayer, but assuming that the action for money had and received was proper, we are of the opinion that for the reasons given the first prayer offered by each defendant should have been granted. As our conclusion precludes a recovery, we will not remand the case.

*Judgment reversed, without awarding a new trial, the appellee to pay the costs.*

THE PHOENIX PAD MANUFACTURING COM-  
PANY, A BODY CORPORATE,

vs.

ABRAHAM ROTH.

*Written contracts: construction; for the courts; preliminary negotiations; merger; parol evidence. Landlord and tenant: lease; use of electric current. Injunction and specific performance.*

Provisions in a lease that the landlord should furnish the tenant with electric current at a certain rate; that the tenant should take all the current that he shall use in conducting his business, from the landlord; and that the tenant would not do anything in or about the premises to controvert or affect the insurance thereon; *Held*, that such provisions do not obligate the tenant to use any electric current nor hinder him from installing and using a gas engine as its source of power for conducting his business. p. 544

All the principles applied to a bill for specific performance apply to the case of a bill for perpetual injunction, when that injunction accomplishes all the objects which could be accomplished by a successful prosecution of a formal bill for specific execution. p. 543

For the specific performance of a contract to be decreed, the contract must be definite and certain in all its terms, and must be free from all shade or color of ambiguity. p. 543

It must be so clearly proven as to satisfy the Court that it constitutes the actual agreement between the parties. p. 543

The construction of a written contract is for the Court. p. 543

In construing written contracts, a Court is entitled to place itself in the same position as that of the parties who made the contract, so as to view the circumstances as the parties viewed them, and to judge of the meaning of the words and of the application of the language to the thing described. p. 544

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What parties to a contract meant to say, must be gathered from what they did say, viewed from the standpoint they then occupied. pp. 543-544

In general all oral negotiations or stipulations between the parties to a written contract, preceding or accompanying its execution, are to be regarded as merged in it, and the latter treated as the exclusive medium of ascertaining the agreement by which the contracting parties bound themselves. p. 545

*Decided January 14th, 1916.*

Appeal from Circuit Court No. 2 of Baltimore City.  
(HEUISLER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, UNER and STOCKBRIDGE, JJ.

*Wm. Milnes Maloy* (with whom was *George M. Brady* on the brief), for the appellant.

*Charles Clagett* and *Wm. L. Marbury*, for the appellee.

BURKE, J., delivered the opinion of the Court.

The appellant is a corporation, and is engaged in the manufacture of coat pads. It owns a large four-story building, of late construction, located at the corner of Monroe and Eagle streets in Baltimore City. The building is equipped with large boilers for the generation of electric light and power, and which produce much more electric current than the appellant requires for its business. The appellant rented certain floor space in the building to tenants to whom it furnished the excess power at an agreed price.

The appellee is a shoe manufacturer, and prior to June, 1914, his place of business was located on Baltimore street. The power which he required in the conduct of his business

was furnished by a gas engine. On the 22nd of June, 1914, he entered into a contract by which he rented about one thousand feet of the third floor of the appellant's building. He took immediate possession of the rented premises, and shortly before the institution of this suit installed a gas engine, and was about to put it into operation. A dispute had arisen between the parties as to the right of the appellee to install and operate the engine. The appellant claimed that, both under the contract of June 22, 1914, and under a subsequent oral contract, which will be presently considered, the appellee was prohibited from installing and operating the engine. The appellee contended that it was more economical and convenient to him to use the gas engine in the conduct of his business, and that he was under no obligation not to use it. The parties being unable to agree as to their respective rights and obligations under the contracts, the appellant filed a bill in Circuit Court No. 2 of Baltimore City for an injunction to restrain the appellee from erecting and operating the gas engine on the rented premises. An injunction was issued as prayed. The appellee answered the bill and moved for a dissolution of the injunction. The testimony was taken in open Court. This appeal was taken by the appellant from an order passed on June 29, 1915, dissolving the injunction and dismissing the bill.

The appellant rests its right to the injunction upon the allegations contained in the bill that the installation and the operation of the gas engine on the rented premises would constitute: *first*, a violation of two provisions of the agreement of June 22, 1914; and *secondly*, a violation of the subsequent oral agreement set out in the bill. The first contention is one of law,—involving the construction of a written contract, and the second is one of fact,—depending upon the evidence appearing in the record. 1. The two clauses of the written contract upon which the plaintiff relies are here transcribed: the landlord (a) “to furnish said tenant with electric current at the rate of six cents (\$.06) per kilowat. The said tenant to take all the current that he uses in

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## Opinion of the Court.

conducting his business from the landlord." (b) The tenant: "Not to do anything in or about the said premises that will contravene or affect the insurance thereon."

We do not deem it necessary to discuss the evidence relating to the second of these clauses, because it is clear that it does not establish the allegation that the installation and operation of the gas engine would contravene or affect the insurance on the building.

The bill seeks by indirection to compel the specific performance of the contracts therein alleged, and the principles which apply to bills for specific performance are applicable to this case. In *Gurley v. Hiteshue*, 5 Gill, 223, it was said: "All the principles which apply to the case of a bill for specific performance apply with equal force to the case of a bill for perpetual injunction, when that injunction accomplishes all the objects which could be accomplished by a successful prosecution of a formal bill for a specific execution." One of the familiar principles applicable to suits for specific performance is "that the contract must be definite and certain in all its terms, and must be free not only from all ambiguity, but likewise free from all shade or color of ambiguity. *Miller's Eq. Pro.*, sec. 683, and cases in notes 1 and 3. It must be so clearly proven as to satisfy the Court that it constitutes the actual agreement between the parties. *Horner v. Woodland*, 88 Md. 512. If this were not the rule courts might enforce precisely what the parties never did intend or contemplate. *Waters v. Howard*, 8 Gill, 277; *Bamberger v. Johnson*, 86 Md. 41; *Dixon v. Dixon*, 92 Md. 432. The construction of the written contract is a question of law for the Court. (*Roberts v. Bonaparte*, 73 Md. 191.) It is the duty of the Court to ascertain and declare the intention of the parties as expressed in the contract. "Obviously, the most simple and satisfactory way to ascertain that intention is to read what they have written in the light of surrounding circumstances existing at the time. What they meant to say must be gathered from what they did say viewed from the

standpoint they then occupied. *Bond v. Humbird*, 118 Md. 650.

In the construction of written contracts the Court "is entitled to place itself in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and to judge of the meaning of the words and of the correct application of the language to the things described." *Nash v. Towne*, 5 Wallace, 699.

Reading the language used in the clause under consideration, in the light of these principles, we find no uncertainty or ambiguity in the terms of the contract. The clause refers to the electric current, but there is no absolute obligation assumed by the defendant to use this current. The obligation assumed by him is to take from the plaintiff all electric current, whether for lighting or power, he might use in conducting his business. Whether he should use electric current for any purpose in the conduct of his business was optional with him, but such current as he did use he was under an obligation to take from the plaintiff at the price fixed by the contract. There is no express prohibition against the defendant's using any other power, and none can be implied from the terms used in this clause. We are unable, by construction, to read into this contract a prohibition against the use of the gas engine which the defendant proposes to operate. This construction is in harmony with the statement contained in the opinion in *Metropolitan Electric Supply Co. v. Ginder*, 70 L. J. Ch. Div. 862. Commenting on a clause in a contract that "the consumer agrees to take the whole of the electric energy required for the premises mentioned below from the company for a fixed period of not less than five years" the Court said: "There is no affirmative contract here to take at all. The defendant does not agree that he will take any energy from the plaintiff company. He says he will take the whole of the energy required. It is competent to him to burn gas if he likes, and to require none."

At the trial the plaintiff, over the objection of the defendant, introduced oral evidence of conversations between the

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agents or officers of the plaintiff and the defendant to prove that it was understood between the parties that the gas engine should not be operated in the building. This testimony was flatly contradicted by the defendant and other witnesses, and the fact attempted to be proved is left very much in doubt. But this evidence was inadmissible. The general and familiar rule is, as stated in *Bladen v. Wells*, 30 Md. 577, "that all oral negotiations or stipulations between the parties preceding or accompanying the execution of a written instrument are to be regarded as merged in it, and the latter treated as the exclusive medium of ascertaining the agreement by which the contracting parties bound themselves."

There is a class of cases in which, within certain limits, parol evidence is admissible to explain written instruments. When such evidence is receivable for that purpose is stated in 1 *Greenleaf on Evidence*, secs. 285-288. The cases of *Walston v. White*, 5 Md. 297, and *Shreve v. Shreve*, 43 Md. 382, are concrete examples of circumstances under which parol evidence may or may not be admitted to aid the Court in the interpretation of written instruments.

2. There remains for consideration the subsequent oral agreement relied on as a ground for the injunction. That is stated in the bill as follows: "Sometime after the defendant had become a tenant in accordance with the terms of the lease, he sought to erect a gasoline engine for the purpose of generating power. The complainant objected, fearing the loss of its opportunity to furnish service, believing that its insurance and the insurance of other tenants, there being three tenants in all, would be injuriously affected. The defendant claimed that his current bills were running higher than he anticipated at the time of making the lease. He did not complain that there was any overcharge. To avoid a controversy and litigation, the parties agreed that while in no wise affecting the lease, the complainant would allow to the defendant for the current bill for electric service as furnished and for bills thereafter a discount or reduction of 15 per

cent., the defendant promising not to seek to install any engine or to use any motive power other than that furnished by the complainant. This understanding was accepted and agreed to, and has since been carried out."

The alleged agreement is not clearly established by the proof. Mr. Van Vorst, the manager of the plaintiff company, testified that he explained to the defendant "about giving him a reduction of 15 per cent. of his bills. He was then perfectly satisfied, and said at that time that would settle the gas engine story forever as long as he was a tenant of the building. He was perfectly satisfied." The defendant positively denied that he made any agreement to give up his right to use the gas engine. Mr. Gulden, the president of the plaintiff company and the only other witness who testified with reference to the agreement, said that he made the arrangement with the defendant to reduce the price of the electric current, and that he did not remember that anything was said at that time about the gas engine. He further testified that he did not intend to alter or change the rights or obligations of the parties under the lease. The contract alleged is not proved with such clearness and certainty as would warrant a decree for specific performance.

Our conclusion is that the order of the lower Court was correct and should be affirmed.

*Order affirmed, with costs.*

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Syllabus.

WILLIAM SCHNEIDER AND WILHELMINA  
SCHNEIDER, HIS WIFE,

vs.

DORA MARTENS.

*Vendor's lien: mere recitals in deed no waiver.*

A vendor's lien, and the right to enforce it, where the consideration for the deed has not been paid, is not waived or lost by the mere recital in the deed that the consideration has been paid. p. 553

*Decided January 14th, 1916.*

Appeal from the Circuit Court for Baltimore County. In Equity. (DUNCAN, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, UNER and STOCKBRIDGE, JJ.

*John Holt Richardson*, for the appellants.

*William Curran*, for the appellee.

THOMAS, J., delivered the opinion of the Court.

The bill in this case alleges that the plaintiff, Dora Martens, in July, 1912, entered into an oral contract with the defendants, William Schneider and Wilhelmina Schneider, his wife, whereby she agreed to sell and convey to the defendants the leasehold property known as No. 3922 Eastern ave-

nue, Highlandtown, Baltimore County, Maryland, of which she was the owner, and the defendants agreed to pay her therefor the sum of \$1,500.00; that in pursuance of the contract the plaintiff, on the 8th of August, 1912, executed and delivered to the defendants a deed for the property which was duly recorded among the Land Records of Baltimore County; that while the deed recites that the consideration was paid, no consideration was in fact paid, and that the recital was inserted in the deed by the attorney who prepared it with the understanding of the attorney and the plaintiff and defendants that the defendants would pay the consideration of \$1,500.00 upon the recording of the deed, but that the defendants refused to pay any part of the consideration mentioned when the deed was recorded, and continue to refuse to pay the same or any part thereof. The bill then prays for a decree declaring the unpaid purchase money to be a vendor's lien upon the property; for a sale of the property for the purpose of paying the lien, and for general relief.

The defendants answered the bill and allege that in August, 1911, the plaintiff "habitually" importuned them to move into and take possession of the property referred to, but that they, not caring to break up their own home, refused to accede to such importunities; that they finally yielded to the request of the plaintiff, and in the month of July, 1911, the plaintiff agreed with them that if they would take the property they could repair and improve the same so as to make it a thoroughly modern dwelling, and pay the plaintiff the difference between the cost of the improvements and the sum of \$1,500.00; that pursuant to said agreement, they, the defendants, expended in improvements on the property the sum of \$1,035.85, and also paid the plaintiff the sum of \$100.00; that the deed for the property, which was not executed until August, 1912, was prepared at the instance of the plaintiff and by her attorney; that they have always been ready and willing to pay the amount they owe the plaintiff, and that they are willing to reconvey the property to the

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plaintiff upon payment by her of the amount expended by them on the property and other amounts due them; that they are also willing to have the property sold, but insist that they be reimbursed for all money expended by them or that may be due them.

The appeal is from a decree of the lower Court declaring the unpaid purchase money to the amount of \$1,500.00 to be a vendor's lien upon the property mentioned, and ordering the property to be sold to satisfy the lien unless the amount thereof was paid within thirty days from the date of the decree.

The plaintiff testified that the defendants are her daughter and her son-in-law. She purchased the property No. 3922 Eastern avenue, in July, 1911, and paid \$2,000.00 for it. It was a two-story brick building, with a two-story frame back building, and was in good condition at the time she purchased it. In the summer of 1911 she had a conversation with her daughter, Mrs. Schneider, which resulted in an agreement on her part to sell the property to her daughter for \$1,500.00. Some time before Christmas, 1911, Mrs. Schneider asked the plaintiff if she could have possession of the property, saying that she would pay for it as soon as she sold her property on Foster avenue, and that she was accordingly allowed to take possession of it in 1911. The deed to the defendants was executed in August, 1912, and recorded on the 16th of the same month, and at the time of the execution of the deed Mrs. Schneider promised to pay the \$1,500.00 as soon as the deed was recorded. Plaintiff asked her a number of times to pay for the property, and she always replied that she had not gotten the money yet, and that finally she told the plaintiff she would not pay her a cent. The improvements were made after Mrs. Schneider took possession of the property. The plaintiff never authorized the improvements, and Mrs. Schneider never made any claim to the plaintiff for any allowance for repairs or improvements, and the plaintiff never heard of such a claim

until after this suit was brought. The plaintiff has never received any part of the purchase money. On one occasion, long after the improvements were made, Mrs. Schneider, who owed the plaintiff's son Fred for the milk business she had purchased from him, came to the plaintiff's house with \$1,000.00 in bank notes and asked her and her son which one she should pay the \$1,000.00 to, and that her son replied: "Give it to me first; I need it bad, and mamma waits a little." On cross-examination the plaintiff stated that the reason she sold Mrs. Schneider for \$1,500.00 a property for which she had just paid \$2,000.00, was that she was her daughter.

Catherine Whaley, who stated that she used to work for Mrs. Schneider and frequently visited her, testified that during the summer of 1913 she asked Mrs. Schneider to lend her some money, and that she replied that she could not do it because she still owed her mother the \$1,500.00 for the house, and that Mrs. Schneider never said anything to her about her mother agreeing to pay for the improvements on the property.

Fred Martens, a brother of Mrs. Schneider, testified that when she took possession of the property in 1911 it was in good condition. He sold Mr. and Mrs. Schneider his milk business, and on the night he made the sale to them, in 1912, she said to him: "Fred, you know I owe mamma \$1,500.00 for the house No. 3922 Eastern avenue, and now I am buying the business I have not got enough money to pay you just now; will you wait until we make a little money, as you know the Foster avenue house isn't sold?" And he told her he "would wait a little while." He further testified that the defendant made some money, and that one morning his sister came to his mother's house, where he lived, and said to him and his mother: "Who shall I pay first?" and that he replied she should pay him first, as his mother could wait a while. In February, 1913, his sister came over to his mother's house with \$1,000.00 and asked who she should give it to.

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and that he told her to give it to him. He never heard of any claim for an allowance for the improvements made on the property until after this suit was brought. After Mrs. Schneider "straightened up with" him for the milk business, in 1914, they "had a fuss" and he told her she ought to pay her mother for the house, and she then, for the first time, said she didn't owe her a cent and stated as the reason for not paying her mother that she had worked for her.

John W. Prinz, Esq., the attorney who prepared the deed for the property, testified that in July, 1912, Mr. Schneider came to him and told him that Mrs. Martens, the plaintiff, desired to see him in reference to the transfer of the property, No. 3922 Eastern avenue. He did not know the plaintiff but knew Mr. Schneider intimately and had represented him in legal matters. He went to the plaintiff's house with Mr. Schneider, who introduced him to the plaintiff and then left him with the plaintiff and Mrs. Schneider. Mrs. Martens told him she was selling the house to her daughter, Mrs. Schneider, for \$1,500.00, and asked him to examine the title and draw the deed, and he told her he would fix the matter up in about two weeks. In the meantime he met Mr. Schneider and asked him who was going to pay the expenses of the transfer, and he said Mrs. Martens was advancing the money and that Mrs. Schneider would settle for everything after the deed was recorded. He heard no more of the transaction until the month of July, 1914, when the plaintiff called at his house, and after his conversation with her he communicated with Mr. Schneider, and when witness saw him he told him that he had been advised by the plaintiff that they had not paid the \$1,500.00 they agreed to pay for the house. Mr. Schneider said that he did not see where he owed anything because the transaction had been arranged between the plaintiff and his wife; that he knew nothing of the terms of the agreement, and that if Mrs. Martens made any attempt to collect the money he was going "to swear a warrant out for her," and asked the witness to communicate that statement to the plaintiff. With the consent of Mr.

Schneider he went to see Mrs. Schneider in August, 1914, and told her that Mrs. Martens said she had failed to pay the \$1,500.00. Mrs. Schneider replied that she did not see where she owed the plaintiff a cent; that she had done a lot of work for her for a number of years, and that she didn't think her mother ought to expect anything from her, that "some of the other children had been doing nothing, and had been getting it all," while she had been doing lots for her mother for years and had gotten nothing. He then said to her, "But didn't you promise your mother the \$1,500.00 for the property?" and she replied, "Yes, but I don't see where I owe her one cent." He told her that her mother would probably institute proceedings, and, as he knew all the parties so well, he would be very glad to do anything he could to "forestall" such action, and that Mr. and Mrs. Schneider then said that if legal proceedings were instituted they "would have the old lady locked up." The witness further stated that he discussed the controversy between the plaintiff and the defendants very fully with the defendants, and that they "never mentioned a word" about any claim for improvements made by them on the property, and "never even intimated any such thing," although he had probably seen the defendants eight or nine times.

The only evidence offered by the defendants is the testimony of Mr. Schneider, who stated that he did not know anything about the terms upon which the property was sold, and that he had nothing to do with the improvements, and the testimony of Mrs. Schneider, which, to say the least, is far from satisfactory, and would hardly be sufficient to establish, with certainty, her own theory of the case as presented by the answer, even if there was no other evidence in the case. It would serve no purpose to make further reference to this evidence, except to say that it is not sufficient to overcome the evidence produced by the plaintiff, and that it convinces the Court that the defense relied upon was an afterthought on the part of the defendants.

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The right to a vendor's lien and to enforce the lien where the consideration for a deed has not been paid, notwithstanding a recital in the deed that it has been paid, is fully recognized in this State. *Carr v. Hobbs*, 11 Md. 285; *Bratt v. Bratt*, 21 Md. 578; *Hooper v. Logan*, 23 Md. 201; *Thompson v. Corrie*, 57 Md. 197; *Hooper v. Central Trust Co.*, 81 Md. 559. In *Hooper v. Central Trust Co.*, *Supra*, the Court said: "Now the vendor's lien exists for unpaid purchase money, even though a deed has been executed and possession of the property has been delivered. *Schwartz, Guardian, v. Stein*, 29 Md. 112. Perhaps it would be more technically accurate to call the lien a grantor's lien after the deed has been delivered. 3 *Pom. Eq.*, Sec. 1249, note. The vendor's or grantor's lien is not waived by a recital in the deed that the consideration has been paid. *Thompson v. Corrie*, 57 Md. 200."

The rule excluding a parol contract varying a deed (*Bladen v. Wells*, 30 Md. 577) is not relied upon and is not applicable to this case, for here there are no exceptions to the evidence, and the defendants admit that the consideration for which the deed was given was \$1,500.00, but set up as a defense to the bill an alleged agreement with the plaintiff by which they were to be allowed for the improvements made by them on the property, and state in their answer that they are willing to pay the plaintiff the balance of the purchase money due her, or to reconvey the property to her upon payment of the amount expended by them for improvements, and that they are willing to have the property sold providing they are reimbursed for the improvements. The evidence fails to establish the alleged agreement in regard to the improvements, and satisfies the Court that no part of the *admitted* consideration for the transfer of the property to the defendants has been paid by them, and we will therefore affirm the decree of the Court below.

*Decree affirmed, with costs to the appellee.*

## ELLA BURKE

vs.

THE MAYOR AND CITY COUNCIL OF BALTI-  
MORE, A BODY CORPORATE;  
SINGER-PENTZ COMPANY, A BODY CORPORATE;  
ALTON T. NICHOLS AND HARRY M. NICHOLS,  
CO-PARTNERS, TRADING AS NICHOLS BROTHERS.

*Negligence: suits for damages; burden of proof; taking case from jury; duty of court; weight of evidence. Municipal corporations: duties; streets and markets.*

In negligence cases, it is the duty of the court to decide, as a preliminary legal question, whether there be any evidence legally sufficient to be considered by the jury; and the criterion is whether the evidence of the plaintiff is of sufficient probative force to enable an ordinary intelligent mind to draw rational conclusions therefrom in support of the proposition advanced.  
p. 561

If any evidence is competent and pertinent, its weight and value should be left to the consideration of the jury. p. 561

Before the court can grant a prayer taking the case away from the jury, it must assume the truth of all the evidence tending to sustain the claim or defense, as the case may be, and all inferences of fact fairly deducible therefrom. p. 561

It is the duty of a municipality to keep the approaches to the public markets, as well as its streets and highways, in a safe condition for public travel. p. 562

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If Baltimore City negligently fails to do so, and persons, acting without negligence, are injured, the city is liable in damages for the injuries caused by its neglect. p. 562

Direct proof of negligence is not necessary, but, like other facts, may be established by proof of circumstances from which its existence may be inferred. p. 563

*Decided January 14th, 1916.*

Appeal from the Court of Common Pleas. (DAWKINS, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

*Isaac Lobe Straus* (with whom were *Morris & Morris* on the brief), for the appellant.

*James J. Carmody* and *Robert F. Leach, Jr.*, Assistant City Solicitor (with *S. S. Field*, City Solicitor, on the brief), for the appellees.

*John S. Biddison* and *John B. Gontrum* filed a brief in behalf of Nichols Brothers, appellees.

BRISCOE, J., delivered the opinion of the Court.

This is a suit by the plaintiff to recover damages for personal injuries, alleged to have been caused by the negligence of the defendants.

The single question presented by the record is whether the evidence on the part of the plaintiff was legally sufficient to be submitted to the jury, to show negligence upon the part

of the defendants and that such negligence was the cause of the alleged injuries.

The Court below, by its instruction at the close of the plaintiff's case, withdrew the case from the consideration of the jury, and directed a verdict for the defendants, and the action of the Court in granting this prayer is the subject of this appeal.

The defendants below are the Mayor and City Council of Baltimore, the Singer-Pentz Company, a contractor of the City, Alton T. Nichols and Harry M. Nichols, trading as Nichols Brothers, sub-contractors.

The declaration, in substance, avers, that at the time of the injuries complained of, the Mayor and City Council of Baltimore was the owner and had under its control a public building known as the Richmond Market House, situate in the City of Baltimore, and at the time in question the defendants were engaged in repairing and remodeling the building and the surrounding pavements of the market house. That the plaintiff, on the 23rd day of May, 1914, while entering a doorway or entrance of the market, stumbled, fell and was thrown to the floor or pavement thereof by reason of the fact that the defendants had made an opening or trench in the concrete floor or pavement, the existence and location of which the plaintiff was unaware, and from which cause she received painful and permanent injuries and has been put to great expense for medical attention and care. That at the time of the injuries she was exercising due care and caution, but that the injuries she sustained were the direct result of the negligence, default and want of due care upon the part of the defendants, their officers, agents, employees and servants in allowing and permitting said opening or trench to remain for a long space of time without a covering or warning or signal of any kind or description, indicating to the plaintiff the existence and location of this opening or trench.

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It appears that on the 3rd of January, 1914, the Mayor and City Council of Baltimore entered into a contract with the defendant, the Singer-Pentz Company, to erect an enclosure at the Richmond Market, one of the market places of the City.

The work or repairs involving the preparation of the foundation, concrete floors and pavement was sublet by the contractor to the defendant, the firm of Nichols Brothers.

Henry F. Nichols testified that Richmond Market was to be enclosed with an iron framework and iron sash with wire glass, and this iron framework was to set on a concrete base. It was six inches above the sidewalk and extended into the pavement four inches, and the doorways were to be a granite block base, and we were to bring the threshold up so that when the doors were closed it would admit as little air as possible. The preliminary part of the work consisted in digging this trench four inches deep, six inches wide around the entire market where the iron work was to be constructed. "This particular doorway was at the corner of the street; I think the corner may have a radius of about six feet, and the doorway was across the end of that curb, and it naturally extended further across the street than at other points, and I think this particular place anyway was from 12 to 16 inches \* \* \* from the end of the curb or centre of the curb."

The witness further testified that after the excavation of the trench for the threshold, the work was held up, and they quitted work on the door where the accident happened, and left the work in charge of the Singer-Pentz Co.; that when they left the work, they refilled the trench with broken and loose concrete, and it was impossible for anyone to trip over it; but he did not see the trench again from April 24th to July 23rd, 1914, a period of three months. The trench was five feet long, six inches wide and four inches deep, and extended the width of the doorway.

The plaintiff testified that on the day of the accident she first entered the market at Howard and Richmond streets

for the purpose of paying some bills for a lady that she catered for, and then went out of the market by the middle door at the southwest corner of Linden avenue and Biddle street, to make some purchases. She then walked across the street in returning to the market, and, as she expressed it, "catacornered across the street to the corner door of the market, the end door that I went in with my biscuits and satchel."

She then further testified: "I had no other thought than to enter the doorway, to get into the market, and I remember getting up to the door in the front to the doorway.

"Q. Is there a curb or sill at this doorway? A. I think so. Q. Did you place your foot on that curb or sill? A. Yes. Q. Then what happened? A. Then I can't tell what happened, as I was pitched and I only remember for an instant of trying to—I knew I was being pitched and I tried for an instant to catch myself when I was pitched some distance and my head came across the stall like this (indicating) my forehead. Q. How far was that stall from the entrance to the door? A. I judge about four or five feet. Q. When you approached this doorway of the market was there any sign or any warning that would cause you to have seen this ditch? A. No; I didn't see any. Q. Was there a sign or a warning? A. No; I didn't see it. Q. What did you see as you approached the entrance to the market? A. The only thing I saw as I approached the entrance was the door. I didn't think to see anything. I simply came across the street with my one paper bag of biscuits and my satchel, and went to go into this door and when one foot was up in the door and the other foot I didn't know where it went, I was pitched. I really couldn't tell you anything except that my head struck this stall."

She testified upon cross-examination that it was about 1 o'clock in the day, and there was nothing to obstruct her view at the entrance to the market when she stepped from the curb to the doorway; that it was a bright day, and that

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she was alone at the time of the accident. She stated in answer to the question which foot she put in the doorway, that "I think I put my left foot up on the doorsill, because my right shoe was badly damaged, and I really cannot remember much after I got in because I remember being pitched, and for the instant I realized I was being thrown and I tried to catch myself and I think I might have helped myself somewhat if I had not struck the stall, but after my head struck the stall I didn't remember anything for the time being because I just went off like that (indicating)." She also testified there was no warning or anything else that would attract one's attention at the entrance of the door to the hole or trench.

The witness Brooks, a produce and fruit dealer in the Richmond Market and who was conversant with the entrances to the market and also saw the plaintiff shortly after she fell, described the condition of the floor of the market as follows: The floor is all right as far as that is concerned but about one foot inside the curb the contractors opened this trench which the lady fell over.

Q. How large was this trench? I refer to the particular trench that has been testified to in this case. A. Possibly five feet long. Q. And how wide? A. Between 10 and 12 inches. Q. And how deep? A. Three or four inches. Q. On this Saturday, May 23rd, was this ditch open or was it packed in? A. Open, three or four inches deep. Q. Mr. Nichols testified that on April 24th it was packed in tight. Did you see it packed in on May 23rd? A. No. Q. Was there any packing in there? A. To my knowledge there was not. Q. You mean by that that it was open and this broken concrete had been removed? A. There wasn't much concrete there. It was only composed of loose dirt I would call it. The hole was open and what loose dirt was just pushed back in this trench. Q. Do you know of your own knowledge how this packing was taken out of the trench or how this loose dirt got out of the trench? A. Yes, there wasn't any packing done. Q. Do you know that? A. There

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wasn't no packing to be done. Q. Do you know how it came out? A. I am coming to that and that dirt that was pushed back loosely in this trench— Q. Do you know what caused the packing to come out? A. Yes, it was worn out. Q. Do you know whether or not it came out between April and May 23rd? A. Yes, it was worn out by the constant walking over it. Q. Was it taken out? A. No, sir; just worn out by constant walking over it and stumbling over the holes. It was kicked out. It was a hole between 10 and 12 inches wide and people were treading in this hole and that was making it deeper and wider all the time and they tripping on the edge of the trench made it bigger and deeper and so on and that is how it came out. Q. On May 23rd was there any warning or guard thrown around this particular trench? A. No guard whatever. He also testified, that shortly after the accident the hole or trench was filled upon the order of the market master, that there was a sky-light near the entrance to the door where the accident happened and there was nothing to prevent a person from seeing the trench, that the loose dirt that was worn out had been carried away at various times. That the hole was open sometime and the constant walking over it back and forth made the hole deeper and made the hole wider and broke the edges of the trench and made the hole so much more bigger than what it was.

The only other testimony bearing upon the case, was that of Dr. Lloyd as to the character of the injuries received by the plaintiff, as the result of the accident.

We have thus stated the substantial facts of the case, and upon the evidence disclosed by the record, we are of opinion, the Court below committed an error in granting the prayer set out in the exception, which instructed the jury that there was no evidence legally sufficient to entitle the plaintiff to recover in this case.

There was no prayer presenting the question of contributory negligence, upon the part of the plaintiff, and the only exception, was to the prayer, as to the legal insufficiency of

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the evidence, and this is the only question raised by the record. *W. M. R. R. Co. v. Carter*, 59 Md. 311; *Magaha v. Hagerstown*, 95 Md. 68.

In the case at bar, it cannot be successfully argued that there was no evidence legally sufficient to require the case to be submitted to a jury, under the testimony disclosed by the record.

In *Baltimore Elevator Co. v. Neal*, 65 Md. 438, JUDGE ALVEY said, the Court has no power to examine and decide upon the comparative weight of evidence, that is exclusively for the jury. It is the duty of the Court to decide, as a preliminary legal question, whether there be any evidence legally sufficient to be considered by the jury; and the criterion for the determination of that question is whether the evidence is of sufficient probative force to enable an ordinary intelligent mind to draw a rational conclusion therefrom, in support of the proposition sought to be maintained by it. *Jones v. Jones*, 45 Md. 154; *Mallette v. British Ass. Co.*, 91 Md. 482; *Moyer v. Justis*, 112 Md. 222.

If there is any evidence competent, pertinent or of a probative force, to support the plaintiff's case, the weight and value of such evidence should be left for the consideration of the jury, and as it has frequently been stated by this Court, before such a prayer can be granted the Court must assume the truth of all the evidence before the jury tending to sustain the claim or defense, as the case may be and of all inferences of fact fairly deducible from it.

The actionable negligence charged in the declaration, in this case, upon the part of the defendants, consisted in "allowing and permitting an excavation or trench to remain for a long space of time without a covering or warning or signal of any kind, at the doorway of one of its markets in the City of Baltimore and that the injuries of the plaintiff was the direct result, of this negligence.

It was undisputed and conceded, that the trench or excavation in the market was put there by the defendant, the city,

and its contractors, and they knew of its existence at the entrance and across the doorway, at the time of the injury to the plaintiff and that the ownership of the market house was in the Mayor and City Council of Baltimore.

The theory of the plaintiff's case, is that the trench or excavation or obstruction at the entrance or doorway of the market, was a nuisance, existing in one of the highways or public markets of the city, under its control and permitted there by the city and it was this negligent act, that caused the injury.

The duty of a municipality to keep the approach to its public markets, as well as all other parts of its streets, and highways, in a safe condition for public travel, is well established by a number of recent decisions of this Court.

In *Baltimore City v. Beck*, 96 Md. 190, we said, if the City negligently fails so to do, and persons acting without negligence are injured, the City is liable in damages for the injuries caused by such neglect. *Balto. City v. Walker*, 98 Md. 643; *Magaha v. Hagerstown*, 95 Md. 62; *Garrett Co. v. Blackburn*, 105 Md. 226; *McCarthy v. Clark*, 115 Md. 466; *Annapolis v. Stallings*, 125 Md. 345.

As to the contention that there was a total failure of evidence to show how the accident occurred, or what caused it, or that the negligence of the defendants produced the particular injury, we need only say there was some evidence to support the theory of the plaintiff, that she stumbled and fell at the approach of the doorway of the market, by reason of the hole or excavation, that had been made and left uncovered by the city. The weight and value of the testimony was for the jury, to establish the facts sought to be inferred, under proper instructions from the Court.

In *Benedict v. Potts*, 88 Md. 54, we said, direct proof of negligence is not necessary but like any other fact, it may be established by the proof of circumstances from which its existence may be inferred.

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Opinion of the Court.

As the judgment in this case will be reversed and a new trial awarded, we shall refrain from any further comment upon the evidence.

We do not understand that the liability of the defendant, the Nichols Brothers is involved on this appeal. The prayer offered upon the part of the Nichols Brothers, one of the defendants, in the Court below, withdrawing the case from the jury, was conceded by the plaintiff. The prayer was granted as conceded and under the direction of the Court, the jury rendered a verdict on behalf of these defendants. There was no exception to the granting of this prayer. In the brief on behalf of the city, it is stated, that at the conclusion of the plaintiff's case the following prayer (meaning the prayer set out in the exception) was offered on behalf of the defendants, the Mayor and City Council of Baltimore and the Singer-Pentz Company.

It follows, for the reasons stated, that the judgment will be reversed and a new trial awarded, as to the defendants, the Mayor and City Council of Baltimore and the Singer-Pentz Company, a body corporate.

*Judgment reversed and new trial awarded,  
with costs.*

## SALLIE L. WALKER

vs.

## THE WASHINGTON GROVE ASSOCIATION.

*Leases: redemption; Code, section 92, Article 21, and section 24, Article 53; not applicable where rent uncertain; camp-meeting rentals.*

Chapter 485 of the Acts of 1884 (included in section 92 of Article 21, and section 24 of Article 53 of the Code), relating to the redemption of leases, were passed for the purpose of breaking up long, irredeemable leases, rather than for any special consideration for the lessees. p. 568

The Act is remedial in its character, and is to be liberally construed, so as to advance the remedy and suppress or prevent the mischief against which it was directed. p. 568

While the statute was passed more particularly with reference to Baltimore City, it is by its terms applicable to the whole State. p. 568

But the statute has no application to the lots of a Camp Meeting Association, which are leased for rentals of indefinite and variable value, which do not admit of exact capitalization, according to the terms of the Act. p. 569

*Decided January 14th, 1916.*

Appeal from the Circuit Court for Montgomery County.  
In Equity. (PETER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BURKE, THOMAS, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Robert B. Peter* (with whom was *Robert H. Walker* on the brief), for the appellant.

*L. Cabell Williamson* (with whom were *John Ridout* and *Frank Higgins* on the brief), for the appellee.

Md.]

## Opinion of the Court.

Boyd, C. J., delivered the opinion of the Court.

This is an appeal from a decree dismissing a bill in equity filed by the appellant against the appellee to require the latter to execute and deliver unto the former a deed of the reversion in fee in the lot of ground described, under the provisions of Article 21, section 92 of the Code. The appellee was originally incorporated under the Act of 1874, Chapter 135, by the name of the "Washington Grove Camp-Meeting Association of the District of Columbia and Maryland." The name was changed by Chapter 467 of the Acts of 1908 by striking out "Camp-Meeting." On the 6th of October, 1886, the appellee leased unto John N. Bovee a lot "known and designated as Lot 23, Grove Ave., on the map of the cottage department of the ground belonging to the said association, known as Washington Grove," for the term of ninety-nine years, renewable on the same conditions for like term of years forever, "paying for said demised premises to the said association, their successors or assigns, annually, such sum of money not to exceed six per cent., per annum of the par value of said five shares of stock as may be from time to time assessed by the said association, their successors or assigns, subject, however, nevertheless and this lease is granted and accepted according to such regulations as have been, (or) which shall at any time hereafter be adopted, for the government of said camp-meeting grounds, and which are made part of this indenture as fully and to all intents and purposes as if they were incorporated herein."

The preamble of the leases is: "Whereas, John N. Bovee, of Washington, D. C., being the owner of five shares of the capital stock of the 'Washington Grove Camp-Meeting Association of the District of Columbia and Maryland,' is entitled to have one of the lots or parcels of ground situate in the cottage department of the grounds belonging to said association." The consideration mentioned is one dollar and "the waiver and release by him of all rights and claims in and to any and all dividend or dividends, gain or gains which may hereafter, so long as this indenture shall remain in full

force and value, accrue and be due and payable on the said five shares of stock, as well as in consideration of the covenants and promises of the said John N. Bovee hereinafter contained," etc. He covenanted to waive and relinquish the dividends and gains accruing to the five shares of stock and "to pay any assessments hereinbefore provided within 30 days after notice of the same shall have been given." He also covenanted as to the use of the property and not at any time during the term to "give, demise, let or assign, or in any manner dispose of the hereby demised premises, or any part thereof, for all or any part of the term hereby granted, to any person or persons, without the consent in writing of the said association, or their successors or assigns, first had and obtained." Upon neglect or refusal to pay any assessment, or to perform the covenants, it was made lawful for the association, their successors and assigns, to enter upon the premises and at the option of the association the lease was to be "null and void and the estate hereby granted, cease and absolutely determine."

The association gave its consent to the assignment of the lease first to Christiana B. Schively, and then by her to the appellant. The answer denies that the indenture is a lease, and alleges that the respondent had no power to make such a lease, etc.; but we will not discuss those questions and will treat it as a lease. The appellee also contends that the Act of 1884, Chapter 485 (now included in section 92 of Article 21 and also section 24 of Article 53), if applicable to this lease, would be inoperative, because it would have the effect of impairing the obligation of the contract created by the Act of 1874—its charter. It is only necessary to refer to *Washington Hospital v. Mealey*, 121 Md. 274, in which, on page 282, some prior cases on the subject are cited, as that case sufficiently answers the contention. The only point in this case which requires our consideration is the one which was decided by the learned Judge in the Circuit Court—whether the lease is subject to the Act of 1884. It was made in 1886, and hence after the Act of 1884 was passed, and

Md.]

## Opinion of the Court.

before the Act of 1888, Chapter 395. We are therefore only called upon to consider the Act of 1884, which was in effect when the lease was made. At that time there was a by-law in force which provided that

“Hereafter title to selected lots shall be by lease, for a period of ninety-nine years, subject to conditions imposed by these by-laws, or which may hereafter be imposed by such by-laws of the Association as are in force when said lease is executed; and no condition shall be imposed having a retrospective effect.”

In the stipulation of facts filed it is stated:

“That whenever a stockholder who had located by his certificate, and prior to November 20, 1905, requested the Board of Trustees or directors to issue papers similar to the paper purporting to be a lease filed with the bill, on said lots in connection with said certificate of stock, such papers were issued, and at all times whenever the stockholder sold his stock and lot and the purchaser was accepted by the Board of Trustees, new stock was issued to the purchaser, and located on the same lot, and if the paper purporting to be a lease had already been granted, and the request was made for that purpose, the trustees would consent to its transfer or assignment to the new holder. No papers purporting to be leases were issued after the revision of the by-laws on April 12th, 1907. None of the papers purporting to be leases were issued to any one, except they were stockholders and had located their stock on the particular lot or lots.”

The Court below held that the lease was not subject to the Act of 1884 by reason of the indefiniteness of the amount to be paid, but the appellant contends that inasmuch as she offered to pay the highest amount of assessments that could be assessed, she is entitled to a deed.

We fully appreciate the importance of the legislation which is now embraced in the two sections referred to—the begin-

ning of which was the Act of 1884. JUDGE STONE, in *Stewart v. Gorter*, 70 Md. 242, said, that the legislation "was the result of a well grounded belief that these long leases, with their covenants of renewal, were injurious to the prosperity of the City of Baltimore, and that sound public policy demanded that all leases hereafter made, if for more than fifteen years, might be ended at the option of the tenant or lessee, upon paying the capitalization of his ground rent, at six per centum. It was the system of these long leases, irredeemable until the end of the term, that the Legislature wished to break up, rather than for any special consideration for the lessees, that caused the Act." It has been held by us that the legislation was remedial in its character, and is "to be liberally construed so as to advance the remedy and suppress or prevent the mischief against which it is directed." *Swan v. Kemp*, 97 Md. 686. The subject has been before us as late as in the case of *Brager v. Bigham et al.*, 127 Md. 148, where we held that the statute was applicable, but none of the cases seem to us to meet the conditions we now have before us. While the statute was doubtless passed more particularly to correct the injury to property in Baltimore, it was made applicable to the whole State, but although that is true, it may well be questioned whether the Legislature ever intended it to apply to leases made by a corporation of this character exclusively to its stockholders. In order to induce persons to become stockholders, and aid in making improvements on the property but still permit the association to have some control over it, it was necessary to adopt some plan different from what would be done in ordinary business corporations, and the plan of executing these leases was the one selected. That was before the Act of 1884 had been passed, and it may well be doubted whether a single stockholder had any idea that that Act would be applicable to leases made by the association after 1884 until sometime about 1893 when the question was raised, as shown by the stipulation of facts.

Md.]

## Opinion of the Court.

It is unquestionably true, as JUDGE PETER said in his opinion below, that the amount of rent, if we call it such, reserved in the lease is altogether indefinite. There may be no assessment, and hence no rent to be capitalized, or it may vary anywhere from nothing to six per cent. on the par value of the stock. It is said on the part of the appellant that she offered the largest amount that could be assessed, and hence the indefiniteness of the amount is immaterial, but if no rent had been reserved, could the appellant have become entitled to a deed in fee by offering the par value of the stock or other sum? We think not, because the capitalization of nothing is still nothing. If the rent (treating the assessment as rent) is one dollar a year, then the capitalization at six per cent., would be sixteen dollars and sixty-six and two-thirds cents, if two dollars, twice that amount, and so on. The statute does not say it may be capitalized at the highest rent that can be charged, but for a sum equal to the capitalization of the rent reserved at the rate of six per centum, unless some other sum not exceeding four per cent. capitalization of said rent be specified in the lease—assuming that there would be a definite rent specified. There is no such reason for authorizing the redemption of such an instrument as this, as has been given by this Court, as the cause of the passage of the statute.

But beyond what we have said, this lease was not made only in consideration of the lessee paying “such sum of money not to exceed six per cent. per annum of the par value of said five shares of stock as may be from time to time assessed,” but a part of the consideration was that the lessee waived and released “all rights and claims in and to any and all dividend or dividends, gain or gains, which may hereafter, so long as this indenture shall remain in full force and value, accrue and be due and payable on the said five shares of stock, as well as in consideration of the covenants and promises of the said John N. Bovee, hereinafter contained.” If therefore it be conceded that the owner of the leasehold estate tendered payment of the capitalization of the highest

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amount she could be assessed for, which was six dollars per annum, the capitalization of which at six per cent. is one hundred dollars, what is to be said of the release of the dividends or other gains that may accrue? The lessee only released such as accrue and are due and payable "so long as this indenture shall remain in full force and value," and hence if this indenture ceased to be in force, the provision for the release of dividends, etc., would cease. It would be impossible to ascertain, and capitalize the amount of such dividends or gains, yet they are as much *rent* within the meaning of this instrument as the assessments. If it be said that there may be no dividends or gains, we reply, as we said in reference to the assessments, then they could not be capitalized, but if there are, no one has said what they were in the past, and no one can say what they will be in the future. They may be far beyond the value of this lot, as fixed by the tender of the appellant. It is true that the charter seems to limit the dividends to six per cent. per annum on the stock, but the stockholders have an interest in the lands and improvements purchased and built, and in the event of the dissolution of the corporation there may be large accumulations to which they may be entitled. Moreover, whatever the value of the waiver and release may be, it was not included in the tender.

It can not be contended that it was ever intended that the Association should surrender its entire ownership and control of the lots in the cottage department, where this lot is. The stipulation of facts shows that it pays the State and County taxes on the lots, and the leaseholders pay them on the improvements. There is no covenant or agreement by the lessee to pay the taxes on the ground included in the lease, as is the custom in ordinary leases for ninety-nine years, and these leases were only made to stockholders who had located their stock on the particular lot or lots. Of course we do not mean to say that the agreement or understanding of the parties could prevent a redemption, if other-

Md.]

## Opinion of the Court.

wise entitled to it, for it was settled in *Stewart v. Gorter, supra*, that the tenant could not be estopped by any covenant, however strongly worded, from claiming the right to redeem under the statute, but we refer to the above facts to show that our construction of the instrument does not do any injustice to the lessees or those claiming under them, and the circumstances tend to support our construction of the instrument.

We have not felt called upon to decide anything except whether the appellant is entitled to redeem, and confining ourselves to that, without determining whether the Association has in any way exceeded its powers, or whether there could be any legal objection to the form of the lease, or any portion of it, we hold that it is not subject to the Act of 1884, Chapter 485, and will therefore affirm the decree of the lower Court.

We have no fear of the suggested injurious effect on the statutes on the subject of redemption of leases, by the conclusion we have reached. It is not at all probable that such a plan as this Association adopted will be followed for the purpose of evading them. People do not generally seek to evade statutes except for purposes of gain, and we think there is no danger of leases being made for such purposes, with reservations of rents so indefinite that it can not be told how much they can be capitalized at. But if there is such danger, the Legislature can provide for it by prohibiting such leases, or authorizing redemption of them in some definite way. So far, the Legislature has not prohibited leases for 99 years, renewable forever, but has only provided for the redemption of such as come within the several statutes which have been passed on the subject.

*Decree affirmed, the appellant to pay the costs.*

R. H. FRAZIER AND SON, EMPLOYER, MARYLAND  
CASUALTY COMPANY, INSURER,

vs.

MARTIN LEAS, CLAIMANT.

*Workmen's Compensation Act: appeals from commission; not confined to same evidence; oral evidence. Statutes: construction; intention. Constitutional law: jury trials; implies right to adduce evidence.*

In construing statutes, the intention of the Legislature, as expressed in the words of the Act, must be ascertained and given effect. p. 575

The language of the Act is its most natural expositor, and where the language is susceptible of a sensible interpretation, it is not to be controlled by any extraneous considerations. p. 575

The construction must be liberal in favor of private right, and any construction which imputes an intention to deny valuable rights is to be avoided. p. 575

Statutes are presumed to have been passed in full recognition of the constitutional rights of citizens. p. 575

Trial by jury implies the right of either party to the cause to call witnesses to support his case. p. 576

Chapter 800 of the Acts of 1914—the Workmen's Compensation Act—provides that the decision of the Commission shall be treated on appeal as *prima facie* correct, and that the burden of proof shall be on the party attacking it. p. 577

An appeal from a judgment of the Commission to the courts, presents for determination questions of law and facts. p. 576

No provision of the Act attempts to confine or limit the appeal to the testimony taken before the Commission. p. 576

Md.]

Syllabus.

The Act secures to the party appealing the right to a trial by jury, and the right to have any question of fact involved in the case submitted to the jury. p. 577

And on such an appeal the party attacking the decision of the commission may, under the statute, introduce any proper oral evidence. p. 577

*Decided January 14th, 1916.*

Appeal from the Superior Court of Baltimore City.  
(DUFFY, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BURKE, THOMAS, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Walter L. Clark* (with whom was *George W. Dexter* and *Austin J. Lilly* on the brief), for the appellant.

*Benjamin L. Freeny*, for the appellee.

BURKE, J., delivered the opinion of the Court.

The appellants in this case made an application to the Superior Court of Baltimore City under section 55, Chapter 800, of the Acts of 1914, known as the "Workmen's Compensation Law," for the review by that Court of a decision of the State Industrial Accident Commission rendered against them on the 22nd of July, 1915, in favor of Martin Leas, claimant, who is the appellee on this record. The order which the Court was asked to review does not appear in the record, nor does the record contain a copy of any of the proceedings of the Commission, although it states that at the hearing of the appeal the Court had before it a transcript of the testimony taken before the Commission. Enough, however, appears to enable us to pass upon the single question presented, which is a narrow one and involves a construction of the section of the Act referred to.

The application by which the proceedings in the lower Court was initiated stated facts which showed jurisdiction in that Court to entertain the appeal, and that the appellants felt aggrieved by the decision of the Commission by the terms of which compensation was ordered to be continued from June 3, 1915. It further alleged that they felt that the Commission had not justly considered all the facts concerning the injury; that it had exceeded its powers under the Act; and that it had misconstrued the law and the facts applicable to the case.

At the hearing the appellants filed a motion to be allowed to introduce evidence in support of the appeal to show:

"1. That the transcript of the testimony taken before the State Industrial Accident Commission does not contain all the facts upon which the Commission founded its decision.

"2. Because the report of Dr. Robert Bay, the Chief Medical Examiner of the State Industrial Accident Commission, is not embodied in said transcript of the testimony.

"3. Because the evidence of Dr. Keller, taken before the State Industrial Accident Commission, shows that he ceased attending the claimant on April 18th, 1915, at which time, in the opinion of said physician, he was suffering from the results of the hernia, but the testimony of Dr. Keller does not show from what he was suffering at the time of the hearing before the State Industrial Accident Commission on July 22nd, 1915.

"4. Because the insurer is desirous of introducing additional testimony tending to show that on July 22nd, 1915, and at all times subsequent to June 24th, 1915, the date upon which compensation was last paid to the claimant, the said claimant was not suffering from the effects of the hernia sustained by him on January 22nd, 1915, but was suffering from the effects of arterio-sclerosis, which is a disease, and that said disease was not the natural and unavoidable result of the said accident."

Md.]

Opinion of the Court.

The Court overruled the motion. The appellants then offered to prove by Doctors Harvey B. Stone, Charles J. Keller, Henry J. Berkley and Robert Bay, the condition of the claimant on July 22, 1915, the day on which the hearing before the Commission was had. The Court refused to admit the proffered testimony. The action of the Court in overruling the motion and in refusing to admit the testimony of the physicians constitutes the first and second bills of exceptions. A judgment was entered confirming the decision of the Commission and dismissing the appeal, and from that judgment this appeal was taken.

The sole question presented by the appeal is this: Has the party appealing the right under section 55 of the Act to offer additional testimony to that taken before the Commission in support of the appeal? The Court below held that he could not introduce additional testimony, and this holding constitutes the ground upon which the exceptions rest. We are unable to agree with the ruling of the lower Court upon this question. The language of the section must be examined in the light of accepted rules of construction. *First*, the intention of the Legislature as expressed in the words of the Act must be ascertained and given effect; *secondly*, "the language of a statute is its most natural expositor, and where the language is susceptible of a sensible interpretation, it is not to be controlled by any extraneous considerations" (*Alexander v. Worthington*, 5 Md. 471); *thirdly*, the construction must be liberal in favor of private right, and construction which imputes an intention to deny valuable rights should be avoided; *fourthly*, statutes are presumed to be passed in full recognition of the constitutional rights of the citizen.

Section 55 of the Act provides that the Court upon appeal shall determine, (a) whether the Commission has justly considered all the facts concerning injury; (b) whether it has exceeded the powers granted it by the Act; (c) whether it has misconstrued the law and facts applicable to the case decided. The Act provides that the decision of the Commis-

sion shall be treated on the appeal as *prima facie* correct, and that the burden of proof shall be upon the party attacking it. The appeal presents for determination questions of law and fact. The Act secures to the party appealing the right to a jury trial, and the right to have "any question of fact involved in the case" submitted to the jury. The Court is empowered to confirm, reverse, or modify the decision of the Commission, and it is provided that in the proceedings on appeal "full opportunity to be heard shall be had before judgment is pronounced."

There is no provision in the Act which attempts to confine or limit the trial to the testimony taken before the Commission. Section 55 makes no mention of that testimony, nor is there any statement in the Act as to its admissibility or legal effect on appeal. It may be that in some cases the question of the jurisdiction could be determined without recourse to evidence outside the record. The proceedings may disclose a want of jurisdiction. In other cases the defect of jurisdiction may depend upon some fact to be established at the trial. Unless this defect be apparent upon the face of the proceedings, how can the presumption in favor of the jurisdiction be overcome, if the party appealing be denied the right to establish the facts showing want of jurisdiction? Has he not a clear right to offer any pertinent and relevant evidence upon any question of fact submitted to the jury? If not we might have the unheard of situation of a trial by jury in which one of the parties was held bound by evidence which he disputed, and denied the right to offer evidence in his own behalf. Trial by jury implies the right of either party to the cause to call witnesses to support his case. The granting to one a right of trial by jury, and then to deny him the right to introduce witnesses in support of his case would be like the play of Hamlet with Hamlet left out. We have never heard of a case in which this right was denied, and we do not suppose the Legislature intended to introduce such a novel procedure. The Legislature evidently intended, for obvious reasons, to secure to the party appealing the bene-

Md.]

## Opinion of the Court.

fit of section 6, Article 15 of the Constitution which provides: "The right of trial by jury of all issues of fact in civil proceedings in the several Courts of law in this State, where the amount in controversy exceeds the sum of five dollars, shall be inviolably preserved."

The Legislature has made the decision of the Commission *prima facie* correct, but has provided that it may be attacked upon the grounds stated in the Act, and where the proof is insufficient to establish the incorrectness of the decision it may "be reversed or modified." Upon any issue of fact involved the appellant is given the valuable right of trial by jury, and a full opportunity to be heard. It can not be a reasonable supposition that the Legislature designed the language used in conferring these rights should have an interpretation which would in many cases render exceedingly doubtful of any practical utility the rights intended to be secured by the Act. To deny to one attacking the decision upon appeal the right to introduce any proper oral evidence would so clog and hamper the exercise of his rights under the Act as to render them of little value. We can not suppose the Legislature had any such design.

The particular question presented is analagous to appeals to the Circuit Court under section 84, Article 5 of the Code from the decision or order of County Commissioners. The commissioners are required to transmit to the Court a copy of their proceedings, and by section 85 it is provided that on "such appeal either party shall have a right to a jury trial, etc." Upon such appeal the right of the parties to introduce all proper evidence upon any question involved, whether before the Court or jury, has never been disputed and the exercise of this right is universally availed of.

It follows from the views we have expressed, that the judgment appealed from must be reversed.

*Judgment reversed, with costs, and new trial awarded.*

## THE COMMISSIONERS OF ELLICOTT CITY

*vs.*THE COUNTY COMMISSIONERS OF HOWARD  
COUNTY.

*Road Laws: Ellicott City; Ch. 836 of Acts of 1914; taxes collected for road repairs not retroactive; statutes, construction.*

The natural meaning of the words, "taxes levied and collected for road purposes," in the connection in which they are used in Chapter 836 of the Acts of 1914, in the revised charter of Ellicott City, is the taxes *to be expended* in the maintenance and construction of the public roads; the language has reference to taxes levied for the future construction and maintenance of the roads.

p. 583

The provisions in the Act of 1914 relating to the division of the Howard County road taxes between County Commissioners of Howard County and the Commissioners of Ellicott City, do not relate to such taxes raised for the repair of roads that had been made before the Act went into effect.

p. 584

While the salary of the Road Superintendent is money expended for road purposes, the Commissioners of Ellicott City are not entitled to any part of it under the above provisions of the Act of 1914.

pp. 582-583

Statutes are not to be given a retroactive effect unless the words used are so clear, strong and imperative that no other meaning can be given them, or unless the intention of the Legislature could not be otherwise satisfied.

p. 584

*Decided January 14th, 1916.*

Md.]

Opinion of the Court.

An appeal from the Circuit Court for Howard County.  
(FORSYTHE, JR., J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

*James Clark*, for the appellant.

*Edward M. Hammond* (with whom was *Reuben D. Rogers* on the brief), for the appellee.

THOMAS, J., delivered the opinion of the Court.

The bill in this case was filed by the Commissioners of Ellicott City, Howard County, Maryland, against the County Commissioners of Howard County to recover one-half of the taxes levied and collected for road purposes upon the assessable property within the corporate limits of the town of Ellicott City in the year 1914.

Section 81-L of the Act of 1914, Chapter 836, entitled "An Act to revise the Charter of Ellicott City," &c., which was approved April 21st, 1914, and took effect from the date of its passage, provides:

"It shall be the duty of the County Commissioners of Howard County to pay over annually to the Commissioners of Ellicott City one-half of the amount of taxes levied and collected annually for road purposes by the said County Commissioners upon the assessable property, liable to taxation, within the corporate limits of the town of Ellicott City."

The bill alleges that the County Commissioners of Howard County,

"in the month of June, 1914, made a levy of taxes, amounting to one hundred and twenty-three thousand,

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five hundred and forty-five and 85/100 dollars (\$123,-545.85), upon the assessable property in Howard County, for its general expenses, and included in said levy the following items:

"General Road Fund.....	\$21,000.00
"Old Frederick Road.....	4,067.88
"Rover Road .....	300.83
"St. John's Lane.....	8,065.26
"Vineyard Road .....	1,000.00
"Warfield Highway .....	1,900.00
"Triadelphia Road .....	665.58
"Road Superintendent's Salary.....	1,200.00

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"Total of said items.....\$38,199.65,"

that each of the several items referred to were levied for *road purposes* within the meaning of section 81-L of the Act of 1914, but that the defendants insist that the item of \$21,000.00, for "General Road Fund," and the item of \$1,000.00, for the Vineyard Road, are the only items subject to the provisions of section 81-L, and that the amount due plaintiff on account of said last mentioned items has been settled for.

The bill then alleges:

"6. That the said sum of four thousand, sixty-seven and 88/100 dollars (\$4,067.88) levied for the 'Old Frederick Road' as aforesaid, was levied for the purpose of partially reimbursing Jere H. Wheelwright for moneys advanced by him, to the defendant, in the year 1913, for the purpose of the building by the defendant, of a road lying in said County, and known as the 'Old Frederick Road,' said road having been built in the summer of 1913, under a contract made between the County and Forsythe, Clark & Company, Contractors.

"7. That the said sum of three hundred and 81/100 dollars (\$300.83) levied for the 'Rover Road' as aforesaid, was levied for the purpose of paying to the contractors doing the work, the County's part of the cost

Md.]

Opinion of the Court.

of certain improvements made by the defendant in the summer of 1913, to a road lying in said County, and known as the 'Rover Road,' said improvements having been made under a contract between said County and W. Sewell Frizzell and others, contractors, said contract having been entered into subsequent to the making by the defendant, of its levy of taxes for the year 1913.

"8. That the said sum of eight thousand, sixty-five and 26/100 dollars (\$8,065.26) levied for the 'St. John's Lane' as aforesaid, was levied for the purpose of paying to the contractors doing the work, the County's share (forty per centum) of the cost of building, in the fall of 1913, and spring of 1914, a road lying in said County and known as the St. John's Lane, said road having been built by the County and State jointly under the provisions of Sections 67 to 78, inclusive, of Article 91 of Bagby's Code, and known as the 'Shoemaker Road Law,' and under a contract between the defendant and Forsythe, Clark & Company, contractors, said contract having been entered into subsequent to the making by the defendant, of its levy of taxes for the year 1913.

"9. That the said sum of nineteen hundred dollars (\$1,900.00) levied for the 'Warfield Highway' as aforesaid, was levied for the purpose of partially paying a balance due the contractor doing the work, for the county's share (forty per centum) of the cost of building, several years ago, a road lying in said county, and known as the 'Warfield Highway,' said road having been built by the county and State jointly, under the provisions of Sections 67 to 78, inclusive, of Article 91 of Bagby's Code, and known as the 'Shoemaker Road Law,' and under a contract between the defendant and Edwin Warfield, Contractor.

"10. That the said sum of six hundred sixty-five and 68/100 dollars (\$665.68) levied for the 'Triadelphia Road' as aforesaid, was levied for the purpose of paying a balance due by the defendant on the purchase

price of a turnpike road lying in said county, known as the 'Triadelphia Road,' and purchased by the defendant, several years ago, from the Triadelphia Turnpike Company.

"11. That the said sum of twelve hundred dollars (\$1,200.00) levied as aforesaid for the 'Road Superintendent's salary,' was levied for the purpose of paying the salary for the year 1914, of G. Hunter Sykes, road superintendent of said Howard County, employed by the defendant under the provisions of the Act of 1912, Chapter 666, and the Act of 1914, Chapter 33."

The County Commissioners demurred to the bill and this appeal is from the decree of the lower Court sustaining the demurrer and dismissing the bill.

The bill clearly shows that all of the items in dispute, except the item of \$1,200.00 for the road superintendent's salary, were levied by the County Commissioners to meet obligations incurred for work done on the public roads of the county prior to the Act of 1914, and the only question involved in the case is, does the language of the Act, "taxes levied and collected annually for road purposes," when properly construed, include taxes levied for the purpose of meeting such obligations and paying the salary of the road superintendent? We think this question was clearly answered in the opinion of the learned Court below, where it is said: "There is nothing in this section, or Act, which gives the slightest reason to believe that the General Assembly intended it to apply to any levies, except those for road purposes made after the passage of the Act. And it is only a fair construction of it that it was only intended to apply to money to be expended on the roads in the future, and not to money to be expended in the discharge of obligations incurred before the Act was passed, even though those obligations were on account of roads. The bill shows that the items in question were for obligations incurred and existing, and for work done upon roads built before the Act was

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passed, some of them several years. They were outstanding obligations for which the defendant had bound itself by contract long before this Act was thought of. \* \* \* Suppose, as a fair test, that the defendant had borrowed the money from a bank and paid these obligations promptly as the work was done, and then levied for funds to repay the bank, could it possibly be said that this act gives the plaintiff any right to any part of that fund so levied? Surely it could not. That is practically the situation in this case. This money was advanced in some instances, and not demanded in others, when it was due. \* \* \* The last item claimed is for the Road Superintendent's Salary for 1914. And while it is perfectly true that he has charge of highways and bridges, subject to certain restrictions, he is, nevertheless, a duly appointed, qualified and bonded officer holding office for a definite term of years. His salary is stipulated and annually levied for as such. It is impossible for this Court to believe that it was ever the intention of the General Assembly to provide for a part of his salary being paid over to Ellicott City, and thereby require the defendant to levy an additional amount to meet that deficit."

The natural meaning of the words, *taxes levied and collected for road purposes*, in the connection in which they are used in the Act, is taxes *to be* expended in the maintenance and construction of the public roads. The language used obviously refers to taxes levied for their *future* maintenance and construction. That this is the proper construction is further indicated by the provision of section 81-L with reference to the disposition of that part of the taxes paid to the Commissioners of Ellicott City. It provides: "The Commissioners of Ellicott City shall set this amount of money aside as a special fund to be used for repairing, maintaining and building roads, streets, avenues, lanes, alleys, sidewalks and bridges within the corporate limits of Ellicott City; and, in the discretion of said Commissioners, for the redemption of any bond hereafter issued on the credit of said city." The

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words "to be used for repairing," &c., impliedly restrict the use of the fund to repairs, &c., *to be made*.

To give the Act the construction contended for by the appellant would do violence to the well recognized rule in this State. In the case of *Chilton v. Brooks*, 71 Md. 445, the Court said: "It has frequently been decided, both in England and in this State, that a statute ought not to have a retroactive effect given to it, 'unless its words are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature could not be otherwise satisfied; and especially ought this rule to be adhered to when such a construction would alter the pre-existing situation of the parties, and affect or interfere with their antecedent rights.'" There is nothing in the Act to indicate that the Legislature intended the provision referred to to apply to taxes levied for the purpose of enabling the County Commissioners to pay for the repairs, &c., of the public roads made before the Act went into effect, and we would not, therefore, be justified in giving it such a construction.

While the salary paid the road superintendent is in a sense money expended for road purposes, it would be rather a forced interpretation of the Act to hold that the Commissioners of Ellicott City are entitled to a part of the taxes levied for its payment.

It follows from what has been said that the decree of the Court below must be affirmed.

*Decree affirmed, with costs to the appellee.*

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Syllabus.

## LEONORA AKERS DAWSON, TRUSTEE, &amp;C.,

vs.

## LOUISE LEONORA AKERS ET AL.

*Wills: Construction; intention; "children;" devise to a class; trusts, termination of—.*

What a testator meant to say must be gathered from what he did say in his will, as viewed from the standpoint he then occupied; and what the testator says in his will, considered in the light of established legal principles, must govern the interpretation of the will. pp. 588-589

By his will, a testator bequeathed property in trust "for the use and benefit of all the children of" her brother H.; the duration of the trust was declared to be for the time "when there shall be no child of my said brother living and under 21 years of age," at which time it was declared the trust should cease, and distribution be made, in accordance with the terms of the will:

*Held*, that this constituted a gift to a class of persons, and that the mere use of the word "all" preceding the word "children" did not change the legal effect of the rule applicable to such gifts. p. 589

In general, in cases of a devise to a class, the members of the class are to be ascertained upon the death of the testator, since a will usually speaks from that day. p. 589

But where the distribution is, by the terms of the will, deferred to some time after the testator's death, the gift will embrace, not only all the children or members of the class living at the death of the testator, but all those who may subsequently come into existence, and are living at the time designated for the distribution. pp. 589-590

In this case it was: *Held*, that the trust had ended and that a distribution of the property should be made by the trustee to the beneficiaries free and discharged of the trust. p. 592

*Decided January 14th, 1916.*

Appeal from the Circuit Court of Baltimore City. (Dobler, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*John Philip Hill and Floyd J. Kintner*, for the appellant.

*John Henry Skeen*, for the appellees.

BURKE, J., delivered the opinion of the Court.

Albert W. Akers died in Baltimore City in November, 1899, leaving a last will and testament dated November 12th, 1898, which was admitted to probate in the Orphans' Court of Baltimore City, and letters testamentary were granted by that Court to Charles E. Hill, the executor named in the will. The estate has been fully settled in the Orphans' Court. The testator created two trusts by his will, and the executor transferred and delivered to the trustee named in the will the property constituting the trust estate.

The trust created by the third clause of the will gives rise to the question presented by this appeal. That clause is here transcribed:

"I give, devise and bequeath to my sister, Leonora A. Akers, in trust for the use and benefit of all the children of my brother, Harry B. Akers, one undivided third part of all my property and estate, my said sister to collect, as trustee, the rents and income of that one-third part and after deducting therefrom the taxes and

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expenses on or growing out of said one-third part; to use and apply the balance remaining for the support, maintenance and education of said children or child (if at any time there be only one) until the time arrives when there shall be no child of my said brother Harry's living and under twenty-one years of age, at which time the said trust created by this third Clause or my Will shall cease and the said one-third part of my property and estate shall vest in and belong absolutely to the child or children and the issue *per stirpes* of any deceased child of my said brother Harry's, the issue to stand in the place of the deceased child and receive that child's portion."

Harry B. Akers was married in 1888, and he and his wife, Margaret Eugenia Akers, are both living. At the time of the death of the testator Harry B. Akers had two children aged about four and nine years respectively. These children are still living, and each is over twenty-one years of age, and are, we understand, his only children. They filed the present bill on May the 4th, 1915, in the Circuit Court for Baltimore City in which they claimed, upon the facts stated, that the trust created by the third clause of the will had terminated, and that the said trust estate in the hands of the trustee should be distributed and conveyed to them absolutely in equal shares in accordance with the will. The prayers of the bill were:

"(1) That this Court should take jurisdiction in the premises.

"(2) That this Court should decree that the said trust has come to an end.

"(3) That this Court should require the said trustee to render a complete accounting of her administration of her trust, from the beginning thereof up to the date of her discharge, and as affecting all the property of said Albert W. Akers with which she is chargeable as trustee for your orators.

“(4) That this Court should decree a distribution and conveyance by said trustee to your orators in equal shares of the trust estate with which said trustee is chargeable, in accordance with the terms of said will, free, clear and discharged from said trust.”

The trustee in her answer to the bill admitted the facts therein stated, and expressed her willingness to render an account of the trust estate; and averred that she had omitted to file a bond and administer the trust under the jurisdiction of the Court solely from a motive of economy for the benefit of the *cestuis que trustent*. She submitted the matters of the trust to the jurisdiction of the Court, and stated her willingness to file such bond as the Court might require. The answer, however, asked that the bill be dismissed, in so far as it prayed the Court to decree that the trust had terminated and that a distribution of the fund of the trust estate should now be made. It alleged, “that she is advised that by a true construction of the will of Albert W. Akers, referred to in said complaint a copy of which is filed with said bill in this cause as plaintiffs’ ‘Exhibit A,’ Harry B. Akers, the father of the plaintiffs being now alive, the trust created in said will for the use of all the children of said Harry B. Akers has not come to an end and the defendant can not by the terms of said will make a distribution to the plaintiffs during the lifetime of said Harry B. Akers, as in said bill prayed.”

If the trust created by the third clause of the will of Albert B. Akers has terminated, it is conceded that the appellees are entitled to the property constituting the trust. But it is apparent from the allegations of the bill and answer that there are conflicting views as to the true interpretation of the will. Has the trust terminated? The answer to this question must be found in the language of the will. Just as the testator has written the will it must stand. What he meant to say must be gathered from what he did say therein, as viewed from the standpoint he then occupied, and what

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he did say in the will considered in the light of established legal principles, must solve the question before us.

The gift is to Leonora A. Akers, in trust, "for the use and benefit of all the children of my brother, Harry B. Akers." The duration of the trust as fixed by the testator is the time "when there shall be no child of my said brother Harry's living and under twenty-one years of age," at which time he declared the trust should cease and the distribution of the property made in accordance with the terms of the will. It is therefore a gift to a class of persons, and the mere use of the word "all" preceding the word "children" does not change the legal effect of the rule applicable to gifts of this character; *In re Dellinger's Estate*, 170 Pa. State, 104; *Appeal Hunt et al.*, 19 Atlantic Reporter, 548.

It is said in 30 *American & English Encyclopedia of Law*, 718, that: "A class gift may be defined as a gift to a number of persons not named, who are included and comprehended under the same general description and who bear a certain relation to the testator \* \* \*. As a general rule, in cases of a devise to a class, the members of the class are to be ascertained upon the death of the testator, since a will usually speaks from that day. This rule, however, is not unyielding, and where a contrary intention is indicated in the will, such intent is adopted and enforced." In *Thomas v. Thomas*, 149 Mo. 426, it is said: "Where a legacy is given to a class of individuals in general terms, as to the children or grandchildren of a person named, and no period is fixed for the distribution, the time for distribution will be the death of the testator; *Viner v. Francis*, 2 Cox Ch. Cases, 190; *Devisme v. Mello*, 1 Bro. Ch. Cases, 537; 2 *Jarman on Wills*, 6th Ed. 1010, and cases cited.

"Under this rule, children born or begotten prior to, and in esse at the time of, the death of the testator will be entitled to share in the distribution, but those living at the execution of the will who die before the testator are excluded.

"But, where the distribution is by the terms of the will deferred to sometime after the testator's death, the gift will

embrace, not only all the children or members of the class living at the death of the testator, but all those who shall subsequently come into existence and are living at the time designated for the distribution.

"If the bequest is a present bequest, the beneficiaries who are *in esse* at the death of the testator will take vested interests in the fund, but subject to open and let in after-born children who shall come into being and belong to the class at the time appointed for the distribution.

"And, where the distribution is postponed until the attainment of a given age by the children, the legacy will apply only to those who are living at the death of the testator and who shall come into existence before the first child attains the age named, this being the period when the fund is first distributable with respect to any member of the class.

"Where the members of a class take vested interests in a legacy distributable at a period subsequent to the death of the testator, but subject to open and let in after-born children, they take their vested interests in their shares subject to the distribution of those shares as the members of this class are increased by future births, and, on the death of any of the children previous to the period for distribution, their shares will go to their respective representatives; *Tucker v. Bishop*, 16 N. Y. 402." In an elaborate note to the case (*Thomas v. Thomas*), to be found in 73 *American State Reports*, page 413, in which many authorities are collected and discussed, it is said: "Where there is a gift to children as a class, and the share of each child is made payable on the attainment of a given age, the period of distribution is the time when the first child becomes entitled to receive his share. The gift will apply to those who are living at the death of the testator, and to those born before the first child attains the requisite age, and all children coming into existence after that period are excluded; *Whitbread v. Lord St. John*, 10 Ves. 152; *Clarke v. Clarke*, 8 Sim. 59; *Dawson v. Oliver-Massey*, 2 L. R. Ch. Div. 753; *Hubbard v. Lloyd*, 6 Cush. 522; 53 *Am. Dec.* 55; *Handberry v. Doolittle*, 38 Ill. 202; *Andrews*

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v. *Partington*, 3 Brown Ch. 401. This rule fixing the period of distribution at the time the first child becomes entitled to the share is generally denominated a rule of convenience, and springs from the desire of courts to include as many persons as possible within the testator's bounty consistent with convenience."

The testator in this case has mentioned the time at which the trust shall terminate and has also fixed the period for distribution as the time when there shall be no child of Harry B. Akers "living and under twenty-one years of age." That time has now arrived, and the appellees are entitled to the trust property. This case, we think, falls within the principle announced in *Shotts v. Poe*, 47 Md. 513, and in the cases referred to above. In *Shotts case, supra*, a trust was created for the use and benefit of the children of John Lewis Shotts "until they arrive to the age of eighteen years, \* \* \* and when each child arrives at that age the said property to go to my son John Lewis Shotts." In that case, as in this, there were no children born between the death of the testator and the period of distribution fixed by the will. In construing these trust provisions the Court, speaking through JUDGE ALVEY, said: "And as each child attains the age of eighteen years, his or her part of the fund will cease to be held in trust, and will fall into the general fund for the benefit of the son, John Lewis Shotts, the general legatee. The age of eighteen, being the limit of the trust, must be taken to be the age upon which the fund was designed to go absolutely to John Lewis Shotts, the son. The only other question is, whether the term 'children,' used in the declaration of trust, includes children of the son that may be born after the death of the testator? And upon this question there can be no doubt whatever. If there be any question that may be regarded as incontrovertibly settled, in the construction of wills or testamentary papers, it is that an immediate gift to children, *simpliciter*, without additional description, means a gift to the children in existence at the death of the testator; provided there be children then in ex-

istence to take. In 2 *Powell on Devises*, 302, the rule, as deduced from all the cases, is stated thus: 'That an immediate gift to children (i. e., immediate in point of enjoyment,) whether of a person living or dead, and whether it be to the children simply, or to all the children; and whether there be a gift over or not, comprehends *the children living at the testator's death* (if any), *and those only*; notwithstanding some of the early cases, which make the time of the making the will the period of ascertaining the objects.' To the same effect is the rule as stated in 1 *Redfield on Wills*, 330; and in 1 *Roper on Legacies*, 48, 49; and the decided cases fully support the proposition thus laid down by the text writer. *Viner v. Francis*, 2 Cox Ch. Cases, 190; *Radcliffe v. Buckley*, 10 Ves. 195; *Davidson v. Dallas*, 14 Ves. 576; *DeWitt v. DeWitt*, 11 Sim. 41; *Mann v. Thompson*, Kay Rep. 638. And in this State, the late CHANCELLOR JOHNSON fully adopted and applied this rule of construction, as being perfectly well settled, in *Benson v. Wright*, 4 Md. Ch. 278; and there is nothing in the case before us to exclude the application of the rule."

The lower Court by its decree of July 16th, 1915, held that the trust created by the third clause of the will of Albert W. Akers had ended, and that a distribution of the property should be made by the trustee to the appellees free and discharged of the trust. It further adjudged that an account should be taken between the trustee and the appellees. The trustee was directed to pay over all monies and property and to execute and acknowledge the necessary conveyances to effectuate the decree. The costs of the proceedings were directed to be paid out of the appellees' share of the estate. This decree was correct and should be affirmed.

*Decree affirmed, the costs in this Court to be paid by the appellant.*

Md.]

Syllabus.

SAFE DEPOSIT & TRUST CO. OF BALTIMORE,  
 MARY KING CAREY, JOHN E. CAREY,  
 FRANCES KING CAREY, ANTHONY  
 MORRIS CAREY AND SUSANNE  
 CAREY ALLISON

*vs.*

JAMES CAREY, JUNIOR, AS EXECUTOR OF THE WILL  
 OF ANNA KING CAREY, AND IN HIS INDIVIDUAL  
 CAPACITY.

*Wills: Construction; next of kin; husband.*

In general, an ultimate limitation in favor of next of kin or of heirs at law, does not include a husband, unless there be some manifestation of an intention on the part of the testator to include him. p. 597

Where a testatrix, by her will, left her property to her husband during his life, and upon his death to her daughter (and only child), absolutely, if living at the time of the testator's death, and in case the daughter should die before the testatrix's husband, then to the daughter's children or descendants, *per stirpes* and not *per capita*, and in default of any children or descendants, then to the daughter's next of kin: *Held*, that by the correct interpretation of the will, the property was left to the husband for his life, and after his death, to the next of kin of the daughter, *in esse* at the time of the death of the life tenant, in case she did not survive him. p. 597

*Decided January 14th, 1916.*

Appeal from the Circuit Court of Baltimore City. (DOLLE, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Charles McHenry Howard*, for the appellants.

*Francis J. Carey and James Piper* (with a brief by *Carey, Piper & Hall*), for the appellee.

BRISCOE, J., delivered the opinion of the Court.

The bill in this case is filed by the plaintiff, individually and as executor of the will of Anna King Carey, his deceased wife, for a mandatory injunction to compel the defendant, the Safe Deposit and Trust Company of Baltimore, to transfer twenty shares of its stock, now standing in the name of "James Carey, Jr., for life, with remainder over, according to the terms of the will of Anna King Carey" to him, in his individual name, absolutely.

The questions for our consideration are presented by a demurrer to the bill, interposed by the defendant company and the other defendants, who were by an amendment, made parties defendants to the original bill.

Mrs. Carey, the testatrix, died on March 25th, 1908, and her will dated the 10th day of August, 1907, was duly admitted to probate, in the Orphans' Court of Baltimore City. She left surviving her, the plaintiff, her husband, and one child, Frances King Carey, and this daughter died on the 24th of July, 1912, unmarried, intestate and without issue.

By the eighth clause of the will, the one with which we are here concerned, she left and gave all the rest, residue and remainder of her estate, real and personal, wherever situated, to her husband for and during the term of his natural life, with certain power to sell for change of investments or for division of property, as set out therein. She then provided, as follows: From and immediately after the death of my said husband, I give and bequeath all of my personal estate (except leasehold estate) including the proceeds of any sales of real or leasehold estate made by my said husband during his lifetime and re-invested in personal property (not leasehold estate), to my said daughter, Frances King Carey, absolutely, if she be living at the time of my said husband's death,

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and, in case she shall die before my said husband, then to her children or descendants, the descendants of any deceased child to take *per stirpes* and not *per capita*, and in default of any children or descendants, then to the next of kin of my said daughter.

By the same clause of the will she also disposed of the interests in remainder in the real and leasehold property, but as this latter provision of the will does not reflect upon the clause just quoted and here in question, it will not be set out by us.

It is contended upon the part of the appellee, the plaintiff below, that upon the death of the daughter, Frances King Carey, unmarried, intestate and without issue, all of the personal estate, except leasehold estate, which had been distributed to him, for life with remainder over, under the testatrix's will, became vested in him absolutely, as the father and sole next of kin of his daughter.

In other words, that the next of kin of the daughter, under a proper construction of the will, are the next of kin living at the time of her death. And under the laws of distribution in this State, Code, Art. 93, sec. 126, the father would be entitled to the whole of the personal property of the intestate; *Chester Hospital v. Hayden*, 83 Md. 114; *Schaub v. Griffin*, 84 Md. 563; Art. 93, sec. 126, Code, P. G. Laws.

On the other hand the appellants, the defendants below, insist that the testatrix meant that those persons who will be the next of kin of the daughter, at the termination of the husband's life estate, upon his death, will become entitled to the stock here in controversy, and not the plaintiff.

The Court below overruled the defendants' demurrer, with leave to answer the bill and from this order, an appeal has been taken.

We cannot concur in the contention of the appellee, in this case, nor with the construction placed upon the eighth item of Mrs. Carey's will, by the Court below.

By the plain terms of the will she gave her husband a life estate in the property, and from and immediately after the

death of her husband to her daughter absolutely, if she be living at the time of her husband's death and if not then to her children or descendants and in default of children or descendants, then to the next of kin, of her daughter.

It has been settled, by numerous cases in this Court, that similar language used in wills in connection with other parts thereof, was clear evidence that no vested estate was intended to be given until after the death of the life tenant.

In *Cherbonnier v. Goodwin*, 79 Md. 59, it was said: "The words 'from and after' the death of Edward Goodwin, in connection with the limitation over to the grandchildren of the testatrix, clearly indicate that it was the intention of the testatrix to postpone the vesting of the legacy until after the death of Edward Goodwin."

In *Lee v. O'Donnell*, 95 Md. 538, it was also said: "Here the use of the words 'from and immediately after the death,' taken in connection with other parts of the will, fixed the period or point of time with reasonable certainty, at which the estate should vest and become the property of his other grandchildren."

In *Bailey v. Love*, 67 Md. 592, it is also said: "The same words, 'from and after the death of my said aunt,' in Mr. Lorman's will, and 'from and after the death of any child, then I give the share to which such child was entitled, to the child or children of such child,' with great distinctness and force indicate that no vested estate in the legacy or bequest was given, or intended to be given, until after the death of Anne Chancellor, and any child of Anne Chancellor."

But apart from the authority of adjudged cases, as to the time when an ultimate limitation upon a contingency to a class of persons, like the one now under consideration, was intended to take effect, we think, it is clear, that the testatrix, by the language of the will itself, never intended to limit the property in remainder to her own husband, under the designation of next of kin of her daughter.

By the express language of the will she left the property to her husband during his life, and limited it over after his

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death, to the next of kin of the daughter, *in esse*, if she died before her father, to take effect at the death of the life tenant, the father. In other words, "the next of kin" of the daughter should be ascertained and held to mean, next of kin, of the daughter, at the time of the death of the life tenant, and when his life estate terminates; and the limitation over should not take effect at the death of the daughter, as urged by the appellee in this case.

There is nothing in the will now in question, to support any other construction, than the one we have given it here. On the contrary, the words "from and immediately after the death of my husband," taken in connection with other parts of the will, clearly fixed the period or point of time, with reasonable certainty, when the estate should vest and become the property of the next of kin of the daughter, and that was upon the death of the father, if she predeceased her father, as she did in this case.

In the case of *Waters v. Tazewell*, 9 Md. 291, it is said: "A careful examination of the authorities has convinced us that an ultimate limitation, either in favor of next of kin or of heirs at law, does not include a husband, unless there be some manifestation of an intention to include him": 2 *Jarman on Wills*, 6th American Ed. 135; 40 *Cyc.* 1466-7; *Shriver et al. v. Shriver*, 127 Md. 486.

There were other questions argued, and submitted at the hearing, but as the conclusion we have reached disposes of the case, we find it unnecessary to discuss them.

The construction we have given the clause of Mrs. Carey's will, presented in this case, not only gives effect to the manifest intention of the testatrix, but is warranted and sanctioned by the well established principles and rules of law, applied in similar cases.

For the reasons stated, the order of the Court below overruling the demurrers, will be reversed and as the plaintiff is not entitled to the relief sought by the bill, it will be dismissed.

*Order reversed, bill dismissed, with costs.*

W. W. PARKER  
vs.  
CARROLL POWER.

*Prayers: withdrawing case from jury; no evidence; duty of Court. Brokers: when entitled to commissions.*

In passing upon the question whether a case should be withdrawn from the consideration of the jury, the court need only consider the plaintiff's testimony, even though it should be in conflict with that of the defendant; it being assumed, on such questions, that the plaintiff's evidence, tending to sustain his right to recover, is true. pp. 605-606

The test to be applied in determining the legal sufficiency of such evidence is whether it is of sufficient probative force to enable an ordinary intelligent mind to draw a rational conclusion therefrom in support of the plaintiff's right. p. 606

A broker who fully discharges his duty and performs all that he undertakes to do, is entitled to recover for his services, without regard to the fact whether or not such services were beneficial or of value to his employer. p. 609

*Decided January 19th, 1916.*

Appeal from the Circuit Court for Howard County.  
(FORSYTHE, JR., J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, UNER and CONSTABLE, JJ.

*J. R. M. Staum* submitted a brief for the appellant.

*James Clark*, for the appellee.

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PATTISON, J., delivered the opinion of the Court.

In this case the action was brought to recover three hundred and seventy-five dollars alleged to be owing by the appellee to the appellant, as commissions, for procuring for him a loan of seven thousand and five hundred dollars.

The case was tried by jury in the Circuit Court for Howard County, and at the conclusion of the testimony offered by the plaintiff and defendant the case was taken from the jury under the instruction that there was no legally sufficient evidence entitling the plaintiff to recover. Other prayers were offered but were not acted upon and the only exception found in the record is to the granting of the aforesaid prayer.

The evidence of the plaintiff discloses that the defendant, an officer of the United States Army, after some correspondence with the plaintiff, a member of the Baltimore City Bar, called at the latter's office in the City of Baltimore, in the early part of May, nineteen hundred and thirteen, and as the plaintiff testified "he told me that he had looked at two places in Howard County, one of which he would buy, and he asked me if I would loan him a certain amount on an inheritance of his wife in New York, and a certain amount of money on one or the other of the two places he would buy." It seems that on this occasion no definite answer was given him, but on the defendant's second visit to the office of the plaintiff, the party having the money to loan, Mr. McColgan, was sent for and was introduced to the defendant and he told Captain Power, the defendant, that he did not care to loan any money on the inheritance, but that he would loan upon either of the farms that the defendant might purchase. The plaintiff states in his testimony that he at that time "informed Captain Power that this loan would be subject to the usual interest and commission." This he says was satisfactory to the defendant and he with Mr. McColgan visited the farms mentioned. At the first farm visited by them they learned that the wife of the owner, Mr. Earp, was *non compos mentis* and because of this fact they gave no

further thought to a loan upon that property. They next visited the farm owned by William I. Harding, and after examining it, they concluded that they "could loan" upon it six thousand dollars, and communicated this fact to the defendant.

At this time it seems Mrs. Harding was not willing to join with her husband in a conveyance of the farm to a purchaser, but later, on May 23rd, 1913, the defendant sent to the plaintiff from Port Caswell, N. C., the place at which he at the time was stationed, the following telegram—"Mrs. Harding has agreed to convey; husband gives her one-third purchase money; have arranged for ten thousand from estate; will you loan six thousand first mortgage, wire reply my expense." To which telegram plaintiff on the same day wired reply—"Will accept loan of \$6,000 subject to usual commission 5% and title fee," and in response thereto the defendant, on June 2nd, wired plaintiff "Will accept loan on terms offered, letter in full today." The following is the letter referred to:

"Fort Caswell, N. C., June 2nd, 1913.

"Mr. W. W. Parker,  
"Attorney-at-Law,  
"Baltimore, Md.

"My Dear Sir:

"Confirming my telegram of this date, beg to advise that we would want the loan requested, sometime between now and June 30th. I am expecting in the mail today the \$10,000.00 that is to be advanced on the interest in the estate, and the contract with Mr. and Mrs. Harding is ready to be signed as soon as the deposit of \$1,500.00 is forwarded, which will be done as soon as this money is received. Mr. and Mrs. Harding arranged their difference by an agreement whereby Mrs. Harding will receive one-third of the purchase money in lieu of her dower rights. This disposes of her objection to signing and under the contract, which both will sign, they will give a deed not later than June 30th.

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"We have concluded to ask for a loan of \$8,000.00 and will take a loan for that amount if you and Mr. McColgan will advance that sum. We are paying \$14,000.00 and this will give us about \$4,000.00 above the purchase price all of which will be used in making permanent improvements on the place and in purchasing brood mares and other necessary live stock.  
\* \* \*

"I will advise you as soon as the contract is signed so that you can go ahead and examine title. I suppose you can send the mortgage to us here for acknowledgment, so it can be returned to you before the deed is signed. You can then pay over the money to the Hardings upon execution of the deed and date the mortgage same day; or will you want us to come to Baltimore for that purpose?

"With kind regards, and hoping I will soon be a resident of your State, I am,

"Very truly yours,

"Carroll Power."

Upon the receipt of the aforesaid letter the plaintiff submitted to McColgan the request for a loan of \$8,000.00, but he declined to lend more than \$6,000.00 upon the property.

The plaintiff then took the matter up with another client Frank R. Rutter of Washington, D. C., and on June 12th wrote defendant saying:

"I have written my client recommending a loan of \$7,500.00 on your property in Howard County to be made subject to the usual commission of 5% and title fee and at the rate of six *per cent.* interest *per annum.*

"This loan I have offered to another client than Mr. McColgan who will accept it, I feel sure, upon my recommendation, and when he shall do so I shall have Mr. McColgan abandon the other loan of \$6,000.00, which he previously agreed to take.

"Kindly forward me reference to the title at once, so I may proceed with the examination and prepare the necessary papers, forwarding them to you for execution."

Mr. Rutter, as the plaintiff testified, "agreed to make the loan of \$7,500.00 upon the property and this fact was told to Captain Power, upon his next visit to the plaintiff's office. On this occasion the plaintiff says that he and the defendant "had a long talk about it," and when asked to state what was said on that occasion he said "The substance of the talk was that I had secured the loan for him, and would be ready to put it through when he wanted it." Q. "Did Captain Power agree to accept that loan?" A. "Yes, sir; subject to the usual commissions." Q. "What were the usual commissions?" A. "A commission of 5% for securing a loan, a title fee for examining the title, and interest at six *per cent.* per annum."

The plaintiff not hearing from the defendant wrote him on July 9th saying:

"I have been holding \$7,500.00 for you since the middle of June. This money I have had an opportunity to invest several times, but I have not heard from you lately as to when you will want to use the same.

"Accordingly, I am writing to know when you will wish the use of this money, because I am charging you with interest on the same from the time you told me you would want it."

In answer to this letter Captain Power wrote him from Port Caswell, N. C., on July 12th, saying:

"Immediately after my return here, July 2nd, I was sent off with my Company to the Western part of the State and have only just returned. I find a letter from the attorney for the Hardings declining the proposition I made; and, as the loan on the estate is still hanging fire I have decided that the time is evidently not propitious and will drop the whole negotiations for the present.

"Of course I realize that I have kept your money waiting for investment and I will meet the interest charge. Please make it as light as possible, however, for I am already at large expense and have accom-

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plished nothing. As soon as money conditions are more favorable and I can command either enough of the estate or a ready loan on same, since the 1 year will expire November 15th next, I will take up the matter again and put it through, either the Harding place or some other place in that general section, will look at your place in Howard County if not already sold."

On July 22nd the plaintiff answered the above letter saying:

"I am very much surprised to learn from your letter of the 12th inst. that you do not want the loan which I procured for you at your request upon the Harding Property in Howard County. \* \* \* I am entitled to my commission for procuring it \* \* \*. I am enclosing a bill for same amounting to \$375.00, being 5% on \$7,500.00 the amount I obtained for you which is still at your disposal."

The plaintiff received no answer to this letter and he again, on August 16th, wrote defendant asking him for the payment of his commission, and not hearing from this letter he again wrote him on September 1st, and received a reply thereto from Davenport, Ohio, dated September 5th, saying:

"Your letter in reference to your demand for a commission on a loan which was never made reached me while I was changing Station and I have not had time to answer.

"You must have construed my reference to the fact that I was willing to pay any loss of interest on the money which you claim was being held for me as an evidence that I was an easy mark, since you drop that claim for your alleged *client*; and come back with the astonishing demand for your own commission.

"Your claim has no foundation either in law or justice. You advertised that you had money to loan and I sought you in answer to that advertisement. I did not at any time commission you as my agent to seek a loan for me, but applied to you to get what you adver-

tised you already had. You stated to me your terms for making a loan would be the expense of title examination and five per cent. on the loan. You were fully aware at all times of the contingencies under which I was working and that the deal might not go through yet at no time during these negotiations did you claim to be acting for me, or tell me that you expected to be paid regardless of the completion of the transaction and any such intimation from you would have ended the negotiations then and there.

"I have no desire to avoid any honest obligation, but this demand for commission from you as my agent, when you advertised and held yourself out to me as having money to loan, for which you charged commission when loaned, is such a wide departure from right and justice that I decline to pay.

"You are of course at liberty to take any steps you deem proper."

The plaintiff testified upon cross-examination that it was not the understanding that the loan was to be accepted only in the event of the defendant purchasing the farm. He was then asked: "Q. And you say that at that time nothing was said by Captain Power about not taking the money unless he succeeded in buying one or two of the places mentioned? A. No, sir. Captain Power called to see me about a loan, and I sent for Mr. McColgan and introduced him to Captain Power. \* \* \* Mr. McColgan was a man I knew had some money to loan and I sent for him and introduced him to Captain Power. Captain Power told Mr. McColgan about the inheritance in New York on which he wanted a loan and also about the farms. Mr. McColgan told him that he would not loan any money on the inheritance in New York; but that he was willing to loan money on either one of the two farms, which he might purchase. He had not purchased then, but he showed me photographs that he had taken and he told me he would buy one of the two farms. He asked me to find out how much I would loan on either one of them.

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Q. You knew at the time didn't you, that Captain Power would not take the money unless he succeeded in buying one of these places? A. No, sir. What I understood from the negotiations, he wanted to see what was the best deal he could make. When I looked at the Earp Place, I understood there would be some difficulty in getting a deed for the Earp Place. Then I went to the Harding Place, looked it over and decided to advance \$6,000.00 on that place. I communicated that information to Captain Power, and he accepted that loan. Q. According to your contention, you were employed without any contingencies? A. I knew, when the negotiations first began with Captain Power, that Mrs. Harding might not sign the deed, would not sign the deed. But I knew subsequently to that, and Captain Power so informed me, that he had purchased the place, that he wanted the loan; and that closed the transaction."

Mr. McColgan testified that when he was in the office of the plaintiff on the occasion referred to in the testimony of the plaintiff, that "Captain Power told Mr. Parker about two farms he was looking at, and asked him to see how much he would loan on either one of them, and he told Mr. Parker that if he made the loan he would pay him his commission." Upon cross-examination he testified that it was not the understanding that if the defendant did not get either of the farms he was not to take the loan.

Frank R. Rutter, who is connected with the Department of Commerce at Washington, testified that he, upon the recommendation of the plaintiff, agreed, in May or June, 1913, to loan unto Captain Power \$7,500.00 on a farm in Howard County that was to be purchased by him. That the money to be loaned to the defendant "was received by him upon investments with interest paid up to the end of May and that he held it uninvested until September, when he was told by Mr. Parker that the loan was off, that up to such time he was prepared to make the loan."

In deciding whether this case should have gone to the jury on the evidence offered, we need only to consider the evidence

of the plaintiff, even though it be in conflict with that of the defendant as, we must assume, in deciding such question, the truth of the plaintiff's evidence, given to the jury, tending to sustain the plaintiff's right to recover. In *Leopard v. C. & O. Canal*, 1 Gill, 229; *Hiss v. Weik*, 78 Md. 445, the test to be applied in determining the legal sufficiency of such evidence is whether it is of sufficient probative force to enable an ordinary intelligent mind to draw a rational conclusion therefrom, in support of the plaintiff's right to recover; *Jones v. Jones*, 45 Md. 154, and other cases since decided, and if it is of such probative force, then it, with the other evidence in the case, should have been submitted to the jury and its weight and value considered and determined by it.

The contention of the defendant, as shown by his letter of September 5th, is that he never authorized the plaintiff, as his agent, to seek a loan for him. That the plaintiff had advertised money to loan and the defendant supposed that the money so advertised was his, and that he applied to him, not as a broker, but as one to whom the money belonged. That the plaintiff stated to him his terms for making a loan would be "the expense of title examination and five per cent. on the loan." These charges, however, were to be paid only in the event of the loan being fully consummated, that is, in the event of the money being paid over and the relation of debtor and creditor thereby created between him, as the borrower, and the plaintiff as the lender, and as the loan was never so consummated, the plaintiff, as contended by the defendant, is not to be paid such charges.

The evidence of the plaintiff, however, is not in accord with the contention of the defendant. The plaintiff testified that on the occasion of the defendant's visit to his office, he sent for McColgan, a possible lender, and had him talk directly with the defendant, telling him what security he would require, and that he would not loan upon his wife's inheritance. At the same time the plaintiff told the defendant that he would expect to be paid a commission for making the loan. The defendant may have thought upon reading the

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advertisement that the money mentioned therein was the plaintiff's money, but if the evidence of the plaintiff be true, and it is supported by the evidence of McColgan, he could not have thought after such meeting that the plaintiff was the lender. It is admitted by the defendant that the plaintiff was to be paid the expense of title examination and five per cent. on the loan, but this it seemed he did not regard as commissions.

The plaintiff also testified that the loan was not contingent upon the defendant's being able to buy one of the farms mentioned by him. He was told to ascertain and communicate to the defendant the amount that could be obtained as a loan upon each of these farms, that he, the defendant, was going to buy one of them, and that he would want a loan upon the one he bought. He was told, as he states, that a part of the purchase money was to be borrowed upon the inheritance of the wife, and he afterwards learned that Mrs. Earp, the wife of the owner of one of the farms, was thought to be of unsound mind, and incapable of joining with her husband in the conveyance of the farm to a purchaser, and that Mrs. Harding, the wife of the owner of the other farm, would not join her husband in a deed of conveyance therefor, but as he says, none of these obstacles were made conditions upon which the loan when obtained was to be accepted. He knew at the time negotiations were started, as he states, that Captain Power would not be able to buy either of these farms unless he could obtain a loan on the wife's estate in New York, but he was afterwards informed by telegram from defendant dated May 23rd, that these difficulties had all been removed. The telegram referred to being as follows: "Mrs. Harding has agreed to convey; husband gives her one-third purchase money; have arranged for ten thousand from estate; *will you loan six thousand first mortgage, wire reply my expense.*" This telegram was answered by the plaintiff saying: "Will accept loan of \$6,000.00, subject to usual commission five per cent. and title fee," and the defendant replied to this telegram by wire of June 2nd, saying: "Will

accept on terms offered, letter in full today." This letter has been set out in full in this opinion and in it may be found this statement: "Confirming my telegram of this date, beg to advise that we will want the loan requested, sometime between now and June 30th. I am expecting in the mail today \$10,000.00 that is to be advanced on the interest in the estate, and the contract with Mr. and Mrs. Harding is ready to be signed as soon as the deposit of \$1,500.00 is forwarded, which will be done as soon as this money is received. Mr. and Mrs. Harding arranged their differences by an agreement whereby Mrs. Harding will receive one-third of the purchase money in lieu of her dower rights. This disposes of her objection to signing and under the contract which both will sign, they will give a deed not later than June 30th.

"We have concluded to ask for a loan of \$8,000.00 and will take a loan for that amount if you and Mr. McColgan will advance that sum." As stated in the plaintiff's testimony, Mr. McColgan would not take a loan on the farm for more than \$6,000.00 and the matter of a loan of \$7,500.00 was then taken up with Mr. Rutter and he agreed to make a loan at that amount. This fact was first communicated to Captain Power by letter of June 12th, and was thereafter more fully discussed on the occasion of a visit of the defendant to the office of the plaintiff when Mr. Parker says that he agreed to accept the loan subject to "a commission of five per cent. for securing the loan, and title fee and examining the title and interest at six per cent."

It will be recalled that the defendant had said in his letter of June 2nd that he would want the money between that date and the 30th of June, and as the plaintiff had not heard from him at the date of his letter of July 9th, he wrote him calling his attention to the fact that he was holding it for him, and had been holding it for him since the middle of June, and that he was charging him interest on same from the time the defendant told him he would want it. There was nothing said in the letter about commission, nor was it at that time known by the plaintiff that the loan was not to

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be accepted. In reply to this letter the defendant wrote on July 12th, saying: "I have decided that the time is evidently not propitious and will drop the whole negotiations for the present. Of course, I realize that I have kept your money waiting for investment and will meet the interest charge." It was not until the plaintiff's letter of July 22nd, in reply to defendant's letter of the 12th, that the defendant was called upon to pay commissions, and after writing two other letters the plaintiff received a letter from the defendant dated September 5th, refusing to pay said commissions, although he had, on July 12th recognized it seems an obligation resting upon him to pay interest on the money that he had kept waiting for such investment, strongly indicating, at least, that he knew the money had been obtained for such loan, and that it was being held for him.

The plaintiff, as both he and Rutter testified, procured the loan, that is the amount of money that the plaintiff desired as a loan, which the defendant had agreed to accept, and held such amount for the defendant until July 12th, when told by Power that the negotiations were off.

In the case of *Glenn & Co. v. Davidson*, 37 Md. 365, where the action was brought to recover broker's commissions for the negotiation of a loan, this Court said: "A broker who fully discharges his duty, and performs all that he undertook to do, is entitled to recover for his services, without regard to the fact whether such services were beneficial, or of value to his employer." *Kimberly v. Henderson*, 29 Md. 512; *Schwartz v. Yearly*, 31 Md. 270.

The evidence of the plaintiff, we think, has sufficient probative force tending to show the plaintiff's right to recover, to warrant its submission to the jury.

We will therefore reverse the judgment of the Court below.

*Judgment reversed and new trial awarded,  
with costs, to the appellant.*

MARY V. MILLER, AMY P. MILLER, LUCY J. M.  
TAYLOR, ALICE WOLFF MILLER AND LAUR-  
ENCE M. MILLER

vs.

SAFE DEPOSIT & TRUST COMPANY OF BALTI-  
MORE, TRUSTEE, ET AL.

*Stock: dividends; income or corpus?*

The reason for appropriating, to the corpus of a trust estate, the proportion of a stock dividend earned, though not distributed, by the corporation during the life of the testator who established the trust, does not apply to the disposition of a dividend based on corporate profits earned after the trust had come into existence. p. 614

When stock dividends are declared in a testator's lifetime, the stock so acquired normally constitutes a part of the corpus of the estate passing under the will, the same as the original stock on account of which it was issued. pp. 614-615

These principles do not apply to a stock dividend derived from earnings wholly realized after the testator's death. p. 615

Such a dividend could not have passed under the testator's ownership, so as to have become an integral part of his assets, but has the essential and distinctive character of income from the trust estate so invested. p. 615

A stock dividend from earnings, accrued and declared after the trust has become operative, is payable to the life tenant as income. p. 616

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It acquires that character from the time and circumstance of its origin, and not from the terms of the trust under which it is applied to its intended object. p. 616

Though it may be directed to be appropriated to corpus purposes, it is received as income by the trustees. p. 616

An income dividend is payable to the person entitled at the time it was declared. p. 615

Where a testator, creating a trust, declares, in effect, that the whole income from the trust estate, no matter how or when derived, which accrues after a certain date, is to be given to the life tenants, an inquiry as to the original source of an income dividend is unnecessary. pp. 615-616

*Decided January 19th, 1916.*

Appeal from Circuit Court No. 2 of Baltimore City.  
(BOND, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BUEKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

*Eli Frank* (with *John J. Donaldson*, *J. Helmsley Johnson* and *Frank, Emory and Beeuwkes* on the brief), for the appellants.

*Charles McH. Howard* submitted the case on brief for the appellees.

URNER, J., delivered the opinion of the Court.

The will of Llewellyn Miller provided that his residuary estate should be held by the Safe Deposit and Trust Company of Baltimore as trustee, and one-half of the income paid to his wife and one-half to his children during their respective

lives. There were limitations in remainder to the issue of the testator's children upon the death of the last surviving child. It was further provided in effect that if the testator's death should occur prior to January 1, 1911, the income from the estate until that date should be distributed, to an amount not exceeding eight thousand dollars annually, to the life beneficiaries, in the proportions specified by the will, and any surplus of income over that amount should be added to the corpus of the trust, and thirty-one and four-tenths shares to income should be paid to the tenants for life.

The testator died on November 11, 1908, and the trust created by his will has since been administered according to its terms by the trustee therein appointed. The trust estate consists in part of three hundred and fifty shares of the capital stock of the Northern Central Railway Company, which had been owned by the testator at the time of his death. On July 10, 1914, a forty per cent. dividend was declared by the Railway Company payable in its stock at the par value of fifty dollars per share. According to the report of the directors of the company, upon the basis of which the stockholders authorized the dividend, it represented earnings of the corporation accumulated during a period of ten years ending December 31, 1909. In consequence of the declaration of this dividend the Safe Deposit and Trust Company, as trustee under the will of Llewellyn Miller, received one hundred and forty additional shares of the Northern Central stock. The question as to whether the stock dividend thus declared should be treated as corpus or as income of the trust was raised and decided in the *Northern Central Dividend Cases*, 126 Md. 16, where it was presented in connection with similar questions relating to other trusts interested in the stock and dividends of that company. It was there determined that as the dividend was based upon earnings of the company, as shown by the formal report made by its directors and adopted by its stockholders, it should be regarded as income, in conformity with the rule established by the previous decisions of this Court; *Thomas v. Gregg*, 78 Md.

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545; *Quinn v. Safe Deposit and Trust Co.*, 93 Md. 285; *Atlantic Coast Line Dividend Cases*, 102 Md. 73; *Ex Parte Humbird*, 114 Md. 627; *Coudon v. Updegraf*, 117 Md. 71; *Foard v. Safe Deposit and Trust Co.*, 122 Md. 476. It was held, however, that in the case of trusts created by testators who died before the expiration of the ten year period during which the earnings represented by the stock dividend were accumulated, the proportion of the dividend appearing to represent earnings which accrued to the company during the lifetime of such testators should be appropriated to the corpus of the trusts, in accordance with the principle of apportionment adopted in the case of *Thomas v. Gregg*, *supra*.

It was suggested in the opinion delivered by JUDGE BURKE in the *Northern Central Dividend Cases* that the question as to what part of the earnings, entering into the stock dividend, were accumulated during the life of any testator, might be determined by testimony or agreement after the cases were remanded. In pursuance of this suggestion an agreement was reached, and reported to the Court below, from which it appeared, in reference to the particular trust with which we are now concerned, that the proportion of the earnings in question which accrued to the company prior to the death of the testator on November 11, 1908, was seventy-seven and a fraction per cent. of the whole amount, leaving twenty-two and a fraction per cent. as the proportion which accumulated during the remainder of the ten year period expiring December 31, 1909. A corresponding apportionment of the one hundred and forty shares of stock received by the trust from the forty per cent. stock dividend would result in an allotment of one hundred and eight and six-tenths shares to the corpus and thirty-one and four-tenths shares to the income. No question has been raised as to the correctness of the facts and figures leading to the result just indicated, but the theory is advanced that in the case of the present trust the apportionment should be made, not with reference to the date of the testator's death, but as of the first of January, 1911, the time designated in the will prior to which the

income received in excess of eight thousand dollars annually should be added to the corpus of the estate. The income of the trust is said to have equalled that amount, independently of the Northern Central stock dividend, and the contention, therefore, is that as the testator's direction for the addition of the surplus income to the corpus would have precluded the life tenants from receiving such a dividend during the period between his death and January 1, 1911, and as the earnings represented by the dividend had all been accumulated before that period expired, the whole of the dividend stock in question should be held as corpus for the eventual benefit of the remaindermen.

In view of this contention the Auditor prepared and reported two statements of account, in one of which, with a recommendation for its adoption, he apportioned one hundred and eight and six-tenths shares of the dividend stock to the corpus of the trust, and thirty-one and four-tenths shares to the income, upon the basis of the ascertainment of the railway company's earnings with reference to the date of the testator's death, and in the other of which he awarded the whole of the stock to the corpus upon the opposing theory to which we have just referred. Exceptions were filed to each of the accounts thus reported, and after a hearing the lower Court decided that the apportionment should be made with respect to the date, subsequent to the testator's death, when the life tenants became entitled to the entire income regardless of its amount. An order was accordingly passed ratifying the audit which gave effect to that theory. The ruling thus made has resulted in this second appeal.

The reason for appropriating to the corpus of a trust estate the proportion of a stock dividend earned, though not distributed, by the corporation during the life of the testator who established the trust, does not apply to the disposition of a dividend based on corporate profits earned after the trust has come into existence. When the dividend is declared in the testator's lifetime, the stock thus acquired by him would

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normally constitute, like the original stock on account of which it was issued, a part of the corpus of the estate passing under the will. It has therefore been considered proper to inquire as to the extent to which, if at all, such a dividend was earned during a period when the testator as a stockholder had an interest in the corporate earnings, and when the dividend, if at once declared, would have become incorporated in the estate destined for the remaindermen. This consideration manifestly cannot affect the application of a dividend from earnings wholly realized by the corporation after the testator's death. Such a dividend could not have passed under the testator's ownership and have thus become an integral part of his assets, but it has the essential and distinctive character of income derived from the trust estate as invested. The principle is definitely settled, by the cases cited, that a dividend from earnings accrued and declared after the trust has become operative is payable to the life tenants as income. It acquires that character from the time and circumstances of its origin, and not from the terms of the trust under which it is applied to its intended object. Though it may be directed to be appropriated to corpus purposes, it is received as *income* by the trustee. The rule is also well established that an income dividend is payable to the person entitled at the time it is declared. *Northern Central Dividend Cases*, *Thomas v. Gregg*, *Quinn v. Safe Deposit and Trust Co.*, *supra*; *France on Principles of Corporation Law*, 280. If, in this case, the dividend had been declared prior to January 1, 1911, it would have been added to the corpus for the remaindermen in pursuance of the provision in the will requiring such application. But it was not until three years after 1911 that the resolution for the payment of the dividend was adopted, and at that time the life tenants were entitled to the whole income from the estate. Until the declaration of the dividend no part of the corporate earnings constituted income of the trust. In directing the entire income from the trust estate to be paid to the life tenants after January 1, 1911, the will under consideration does not qual-

ify that disposition by making it dependent upon an inquiry as to the original source of any income dividend accruing to the estate, but the income generally, and howsoever derived, which in fact accrues to the trust after the date specified is given to the tenants for life without restriction as to the amount. The case as now presented does not, in our judgment, contain any special elements which require a modification in this instance of the rule of apportionment announced on the former appeal, by force of which the proportion of the stock dividend derived from earnings accumulated since the testator's death is distributable as income to the life beneficiaries.

In *Thomas v. Gregg*, and *Atlantic Coast Line Cases*, *supra*, to which particular reference was made in the appellee's brief, the apportionment of the dividends was made, in each case, with exclusive relation to the time of the testator's death, and we have been unable to find anything in those decisions to warrant the extension of the principle to dividends earned during a later period.

The conclusion we have stated requires a reversal of the order and the remanding of the case to the end that the Auditor's report based upon the theory we have approved may be ratified.

*Order reversed and cause remanded, the costs to be paid out of the trust funds.*

Md.]

Syllabus.

## FLORENCE HUBBARD

vs.

## WILLIAM J. HUBBARD, SENIOR.

*Divorce and Alimony: adultery; not ground for divorce a mensa et thoro; abandonment and desertion; what constitutes.*

A bill for a divorce *a mensa et thoro* and for alimony was filed by a wife on the ground of adultery, and abandonment and desertion by her husband, without just cause or excuse; the evidence showed that the separation was brought about and continued through the consent and wish of the wife, who refused to have her husband live with her unless he should discharge from his employ a bookkeeper, with whom the wife charged he had been having adulterous relations; the husband refused to discharge her, and left the complainant; there was no evidence to sustain the charge of infidelity made by the wife, and no evidence that the husband desired to permanently abandon his wife: *Held*, that the relief prayed should not be granted.

p. 622

As to the allegations of adultery contained in the bill, it was: *Held*, that they were not sustained by the evidence; and it was further *Held*, that:

p. 622

Adultery can not be made the basis of a divorce *a mensa et thoro*, but only of a divorce *a vinculo matrimonii*. (see p. 619)

For a divorce *a mensa et thoro* to be granted under Article 16, section 38 of the Code, on the ground of abandonment and desertion, the complainant must show that the abandonment was the deliberate act of the party complained of, done with the intent that the marriage relation should no longer exist. p. 620

Separation and intention to abandon must concur in order to constitute cause of divorce on the ground of abandonment; but they need not be identical in their commencement.

pp. 620-621

*Decided January 21st, 1916.*

## Opinion of the Court.

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Appeal from Circuit Court No. 2 of Baltimore City.  
(HEUISLER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*James Fluegel*, for the appellant.

*E. L. Stinchcomb*, for the appellee.

CONSTABLE, J., delivered the opinion of the Court.

The appellant filed a bill against her husband asking for alimony, permanent and *pendente lite*, and counsel fees, but subsequently amended the bill by adding a prayer for a divorce *a mensa et thoro*.

The bill alleged as the grounds for relief, that the appellee had been guilty of adultery with one Pearl S. Mitchell in January, 1905, and before the filing of the bill, and that the appellant had not cohabited with him since the discovery; and that the appellee abandoned and deserted her without just cause or excuse. After hearing testimony in support of the bill and answer the lower Court passed a decree dismissing the bill, and from that decree this appeal was taken.

It is presumed the allegation charging adultery was inserted for whatever effect it might have upon the question of alimony, the relief sought before the amendment; for that charge, if proved, could not be the basis for a decree of divorce *a mensa et thoro* but only for a divorce *a vinculo matrimonii*. *Stewart v. Stewart*, 105 Md. 297. The testimony taken in support of this allegation, however, will be considered in whatever manner it bears upon the question of desertion.

We do not intend to reproduce a detailed account of the testimony, for no good purpose would be subserved by so doing, but to give, in the main, the conclusions we have arrived at from a careful reading of the same. The parties were married in 1891, and have lived in Baltimore continu-

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Opinion of the Court.

ously since, where the appellee has been engaged in the business of oyster packing. In 1903 he took into his employment as bookkeeper, Pearl S. Mitchell, a young woman whose home was in Harford County. The oyster packing business was carried on in each year, from about the first of August until the first of the following May, when the business would be closed and Pearl Mitchell would return to her home, returning to work the following August. During the first few years of her employment Miss Mitchell visited a great deal at the home of the appellee, and was apparently upon terms of intimacy with the appellant. It was during one of these visits in 1906 that the only adulterous act is attempted to be proved and it is remarkable that the only testimony offered to prove it was that of the only child of the parties, a boy of about fourteen years of age at the time of the alleged occurrence. Notwithstanding the fact that the son testified that the appellant was present and saw just what he did yet not one word of testimony did she give upon the subject. The explanation of the occurrence given by Miss Mitchell, when called as a witness by the appellant, was convincing. The testimony of the only other two witnesses as to this charge was trivial and what they each observed once, occurred years ago. It was admitted by the appellant that she had as late as the year 1910 visited for several days at different times Miss Mitchell at her home in Harford County. If we were considering this testimony with a view to determining whether the charge was legally established so as to be the basis of a decree *a vinculo* we would not have to dismiss it because it did not measure up to the strict rule of proof required in cases of this character, as determined by a long line of cases in this State ending with *Thiess v. Thiess*, 124 Md. 292, but would not hesitate to pronounce the charge unfounded, from anything that appears in the record.

The parties continued to live together as man and wife continuously until December, 1913, when the appellant left the home of herself and husband and filed a few days later a bill, making the same charges as in the present one. By

agreement the appellee paid her ten dollars a week and a counsel fee to her solicitor. Before a hearing was had on that bill the parties had become reconciled, wholly through the efforts of the appellee, and he took up his abode in an apartment rented and occupied by her until they could get possession of one leased by him after the reconciliation. The reconciliation only lasted for ten days when he left her apartment and the present bill was thereafter filed.

Therefore, the question to be determined is, whether such a case has been made out as entitles the appellant to relief on the ground of the desertion of her by the appellee.

So often has this question been before this Court, and so consistent have been the decisions defining what is legal abandonment and desertion as to form a basis for a decree of divorce, that that must be regarded as finally settled. Taking one of the very latest, that of *Muller v. Muller*, 125 Md. 72, this Court, reiterating the many former decisions, said: "It is provided by Article 16, section 38 of the Code, that a divorce *a mensa et thoro* may be granted for abandonment and desertion. The ground upon which the divorce is asked being declared by the statute, it was necessary for the complainant to allege and prove statutory cause. Abandonment is the deliberate act of the party complained of, done with intent that the marriage relation should no longer exist. *Lynch v. Lynch*, 33 Md. 328; *Gill v. Gill*, 93 Md. 652; *Twigg v. Twigg*, 107 Md. 676; *Matthews v. Matthews*, 112 Md. 582. 'Desertion as a matrimonial offense is the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew the suspended cohabitation, without justification, either in the consent, or the wrongful conduct of the other. Its inherent affirmative elements are two—cohabitation ended, and the other party's intention to desert.' *Bishop on Marriage and Divorce*, Vol. 1, Secs. 662-63. In all cases there must be an intention to abandon.

"Separation and intention to abandon must concur in order

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## Opinion of the Court.

to constitute cause of divorce on ground of abandonment; but they need not be identical in their commencement."

With the separation admitted, let us examine the testimony for the purpose of determining whether the facts show on abandonment "with intent that the marriage relation should no longer exist." And this intent, it has been said, being an intangible thing is sometimes difficult to solve.

It is admitted by both parties that the domestic difficulty is caused by the continued employment of Pearl Mitchell by the husband. The wife insisting upon her dismissal, the husband refusing. The record shows there has been more or less quarreling though not of such a character as to warrant a divorce upon the ground of cruelty of treatment, if that had been one of the allegations of the bill, the quarrels consistently being about this cause. And although the appellant admits that the reason she left her husband's home in December, 1913, was because of a quarrel over the girl, she yet gives no facts or circumstances upon which she bases her charge or suspicion. When he left her apartment in April, 1914, she again admits it was the result of a quarrel over the girl, and again she testifies to no facts or circumstances nor produces any testimony, other than that we have adverted to above and that occurring eight or nine years ago, in support of her allegation that the appellee is guilty of adultery. According to her testimony she told the appellee he would have to discharge the girl as he had promised to do when she agreed that he should come to her apartment to resume their married life, and upon his refusal told him she "would not be second choice." One of the witnesses for the appellant, present at the quarrel, testified that the appellant told the appellee: "Under those conditions (retaining the girl) we can not live under the same roof." The appellee testified the appellant said to him "I positively will not live with you, you take your clothes and get out." Whichever one was correct in quoting just what was said the night of the separation becomes immaterial, for the appellant on the witness stand said she was willing to have the appellee resume the marital state, provided he dismissed the girl.

Like after the first separation, the appellee has been endeavoring to have the appellant relent and take him back, but she refuses only with the same condition and he refuses to comply with that condition.

Applying the law, as we find it, to these facts, we are not able to say that the appellant has made out such a case, by the proof, that shows that the appellee's intention when he left her apartment, or since, was that the marriage relation should no longer exist. In fact his actions since the first separation show to the contrary that he wished it to continue. The facts justify the inference that he is ready at any time to return to his wife the moment she withdraws her condition based upon, as we must hold from the testimony, mere unsupported suspicion. In fact we hold that the condition she imposed was unjustified, and that the separation was brought about and continued through her will and practically her consent. It does seem strange that one could have such an apparent strong conviction on the question of her husband's marital dereliction, so strong indeed as to compel her to leave his home, unless he consented to give up the object of his supposed infatuation, and yet at the same time be unable to give any facts upon which that conviction was based, when it is alleged the improper conduct has covered a period of about ten years.

We are of the opinion, therefore, that there has not been shown an intention to abandon and desert and will affirm the ruling of the lower Court.

*Decree affirmed, with costs to the appellant.*

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Dissenting opinion of PATTISON and URNER, JJ.:

As we understand the testimony in this case, it shows that the appellee's conduct was directly responsible for the separation which is the ground of his wife's suit for alimony. It is proven that he deliberately left the appellant because he was unwilling to comply with the condition she imposed that he dismiss from his service the bookkeeper, Miss Mitchell,

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## Opinion of the Court.

whose association with him had been the long-existing cause of the marital infelicity which the record discloses. While we concur in the view, expressed in the Court's opinion, that the charge of adultery was not sustained by the evidence, yet we think the proof reveals a degree of familiarity in the relations between the appellee and Miss Mitchell which might well excite the wife's distrust. On a previous occasion, in December, 1913, the appellant left her husband and filed a bill for divorce on the ground of his alleged adultery with the person just named. In the following April the parties became reconciled and reunited upon the distinct and positive promise by the appellee that he would within a few weeks permanently dismiss from his employment the woman whose retention had caused his wife so much unhappiness. When the reunion had continued about a week, the appellee informed his wife that he intended to employ Miss Mitchell as his bookkeeper for another year. According to the testimony of a disinterested witness, who was present at the interview, the appellee, in reply to his wife's protest against the violation of his agreement not to keep Miss Mitchell in his service, said, in substance, that he had only come back to live with the appellant for a time in order to destroy her case under the bill she had filed against him, adding, with an oath, that now she would not get a cent, and stating that he would take his clothes and go to his mother's. This was followed by the separation which is the occasion of the present suit. The appellant has testified to her willingness to have her husband return to her at any time if he will sever his relations with Miss Mitchell, but with that condition he absolutely refuses to comply. The very persistency with which he continues such an association, in preference to the marital reunion to which it is the only obstacle, tends strongly to confirm his wife's suspicions and to justify her attitude. In our judgment she is entitled to alimony under the circumstances of the case as developed by the testimony, and we have, therefore, been unable to concur in the decision to the contrary.

## MARION DEEMS

vs.

## STATE OF MARYLAND.

*Criminal Law: Murder; insanity as defense; province of Court and jury. Confession: Held to be voluntary.*

Under the Code of 1912, Article 59, section 4, when any person indicted for crime shall allege insanity in his defense, the jury empaneled to try such person shall find by their verdict whether such person was, at the time of the commission of the offense, or still is insane, lunatic or otherwise. p. 627

Where such a defense is distinctly presented, and the case is not wholly devoid of evidence tending to sustain that theory, it is the constitutional right of the accused to have the jury determine whether or not he was, in law, criminally responsible for the crime for which he was being tried. p. 628

The Court has no authority to decide as to the effect or sufficiency of evidence submitted to the jury on such an issue. p. 628

No instruction can be given by the Court in a criminal case, except in a merely advisory form. p. 628

On appeal from a trial for a capital offense, the rule as to the time for reserving exceptions should not be so strictly construed, as in the case of appeals in civil cases. p. 630

Where the evidence shows that a confession was not influenced by any promise, threat or inducement of any kind, it is admissible in evidence. p. 630

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Syllabus.

The fact that prior to the confession, an officer asked the accused "why he didn't tell the truth," saying that "the truth would hurt no one," and the fact that another officer spoke to the accused of his accountability hereafter, and said: "Why don't you tell it right, you are lying all through?" did not amount to such an improper influence as to render the confession inadmissible. p. 630

On an appeal from a conviction for a capital offense, a motion for the affirmance of the judgment on the ground that the brief for the appellant was not printed prior to the time when the case was reached for argument, as provided by Rule 36 of the Rules of the Court of Appeals, will not be granted, where the Court thinks the ends of justice would not be subserved by the rigid enforcement of the rule. p. 630

*Decided January 28th, 1916.*

Appeal from the Circuit Court for Baltimore County.  
(DUNCAN and McLANE, JJ.)

The facts are stated in the opinion of the Court.

The case was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, UNER and STOCKBRIDGE, JJ.

*Chas. M. Held*, for the appellant.

*Edgar Allan Poe*, the Attorney-General, for the appellee.

UNER, J., delivered the opinion of the Court.

The appellant is under sentence of death upon a conviction of murder in the first degree. The assault which culminated in the homicide was horrible in its brutality. A deaf mute woman was the innocent and helpless victim. While walking on a country highway in the early afternoon of a summer day she was attacked and dragged to a place of seclusion

and there denuded, raped, robbed and beaten to death with a club. There could be no doubt that the appellant was the perpetrator of this fiendish deed. In fact, he confessed the homicide, although he denied the rape, claiming that robbery was the only object of the assault. The sole defense sought to be established at his trial on the charge of murder was that the prisoner was not mentally capable of distinguishing between right and wrong, and of appreciating the nature and consequences of his act, at the time it was committed. No evidence whatever was offered in his behalf except in support of this theory as stated and urged by his counsel. An alienist who examined the prisoner, at his counsel's request, ten days after the homicide, testified that he "had an undeveloped brain, low mental capacity, immatured judgment and reasoning capacity;" and "the various tests showed him to be a man with a brain not more than eleven or twelve years, in other words an imbecile." The witness expressed the opinion that the prisoner understood the difference between right and wrong, but "did not fully appreciate the quality of the act or the consequence of the act." There were two alienists who examined the prisoner at the instance of the State, and who testified that he was capable of appreciating the consequences of his act, as well as of distinguishing between right and wrong, and that he was not an imbecile; but they said that his intellectual development, according to certain tests, and as a result of improper environment and lack of education, was only equal to that ordinarily shown by a child of nine or ten years of age.

In the course of his argument to the jury, Mr. Keech, one of the prisoner's counsel, stated that one of five verdicts could be found, viz: "1st, Murder in the first degree; 2nd, Not guilty of murder in the first degree, but guilty of murder in the second degree; 3rd, Not guilty of murder, but guilty of manslaughter; 4th, Not guilty; 5th, Not guilty by reason of insanity at the time of the commission of the crime charged." Thereupon the Court interrupted the argument,

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## Opinion of the Court.

and said: "Mr. Keech, there can be only one of four verdicts rendered in this case, and I will instruct the jury as to the form thereof." After the State's Attorney had made the final argument, the Court directed the jury as follows: "Gentlemen of the jury, you can bring in any one of four verdicts in this case, namely: "Guilty of murder in the first degree; second, Not guilty of murder in the first degree, but guilty of murder in the second degree; third, Not guilty of murder, but guilty of manslaughter; fourth, Not guilty." An exception was reserved to this instruction as given under the circumstances just described.

The statute relating to the subject of insanity as a defense in criminal cases provides: "When any person indicted for a crime or misdemeanor shall allege insanity or lunacy in his defense, the jury impanelled to try such person shall find by their verdict whether such person was, at the time of the commission of the offense, or still is insane, lunatic or otherwise," Code, Art. 59, sec. 4. It is the humane purpose of this and succeeding provisions of the Code to protect an offender who is mentally incapable of forming a criminal intent from being punished as if he were sane, and to ensure for him the custody and treatment best suited to his unfortunate condition. *Devilbiss v. Bennett*, 70 Md. 557; *Spencer v. State*, 69 Md. 41. In the last cited case CHIEF JUDGE ALVEY stated that the existence of criminal responsibility on the part of a person accused of crime depended upon the question whether he was "competent to form and execute a criminal design; or, in other words, if at the time of the alleged offense, he had capacity and reason sufficient to enable him to distinguish between right and wrong, and understand the nature and consequences of his act, as applied to himself, he is a responsible agent, and amenable to the criminal law of the land for the consequences of his act."

In the case at bar the effort on behalf of the prisoner was to show that he did not measure up to the standard of mental capacity and criminal accountability established by this Court

in the decision from which we have just quoted. This was the point of the inquiry addressed to the alienist called for the accused, and the testimony of this expert furnished some support to the contention of the prisoner's counsel that he was irresponsible. The issue of insanity being thus distinctly presented, and the case not being wholly devoid of evidence tending to sustain the theory of the defense, it was the constitutional right of the prisoner to have the jury determine whether he was in fact and law criminally responsible for the heinous act for which he was being tried. The Court is given no authority to decide as to the effect or sufficiency of evidence submitted to the jury upon such an issue. *Dick v. State*, 107 Md. 11; *Jessup v. State*, 117 Md. 119. It is expressly denied the right to determine a question of that nature by the declaration of the Constitution that in the trial of all criminal cases the jury shall be the judges of law as well as of fact. *Const. Art. XV., sec. 5*. No instruction to the jury can be given by the Court in a criminal case except in a merely advisory form. *Beard v. State*, 71 Md. 279; *Esterline v. State*, 105 Md. 636; *Cochran v. State*, 119 Md. 552. It is clear that in the present case the Court could not have entertained a motion to withdraw the defense of insanity from the jury on the ground that it was not supported by legally sufficient evidence. If such a proposal had been made, it would doubtless have been rejected as being incompatible with the exclusive right of the jury to determine the issue of law and fact involved. Yet the action of the Court to which the exception was taken had virtually the effect of instructing the jury that the defense of insanity was not to be considered. This was the natural and inevitable interpretation to be placed upon the Court's interruption and objection when the prisoner's counsel was suggesting a verdict of "not guilty by reason of insanity," as a possible finding in the case, and the subsequent exclusion of that form of verdict from those to which the jury were confined by the Court's instruction. There is nothing in the record to qualify the

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Opinion of the Court.

significance of this action or to enable us to say that it was not understood by the jury according to its apparent purpose as a direction that their verdict should leave out of consideration the defense of insanity.

In an ordinary criminal case we could have no hesitation in holding that a ruling which had the effect of withdrawing an issue from the jury, when there was evidence admitted in its support, constituted reversible error, and we cannot permit the sense of horror created by the foul and bloody deed, for which the prisoner in this case has been condemned, to prevent the application of the same principle of law and justice in the present instance. If we could find no evidence in the case which might possibly have influenced the minds of the jury in favor of the theory of irresponsibility upon which the defense relied, we might be at liberty to hold that no prejudice resulted to the prisoner from the action of which he complains. But such a conclusion upon this record, would be altogether unwarranted. There was in fact evidence offered, admitted and tending to show that the accused was not capable of fully appreciating the consequences of his act, and the presence of countervailing proof does not entitle us to hold that no injury resulted to the prisoner's case from the elimination of the insanity theory by the instruction under review. It is not for us to weigh the evidence with a view to forming an opinion as to what would have been the probable finding of the jury upon the issue of insanity if it had been left to their determination. It was the prisoner's right to have the jury exercise and express their own judgment upon that question. This right is secured to him by the fundamental law of the State, and when we find that it has been infringed on in the course of the trial below, it is our duty to correct the error and afford the prisoner an opportunity to have a jury decide the issue as to whether he was a sane and responsible malefactor, or a mental defective and degenerate without sufficient reason to control his degraded and vicious impulses. In performing this plain duty we are

simply recognizing, within just and legitimate limits, the right of an accused person, however depraved, to have the jury, before whom he elects to be tried, determine the validity of his defense according to the evidence.

An objection was raised by the State that the exception we have been discussing was not reserved in proper time. It was taken before the verdict was rendered and it was allowed by the Court, and, in a case of such gravity as the one at bar, the rule as to the time of reserving exceptions should not be so strictly applied as to prevent our consideration of the question thus presented.

The record contains another exception, which was taken to the admission in evidence of the prisoner's confession, the contention being that it does not appear to have been voluntary. This objection was properly overruled. The evidence shows clearly that the confession was not influenced by any promise, threat or inducement of any kind. Reference was made in the argument to the testimony of one of the officers that prior to the confession he asked the prisoner "why he didn't tell the truth," that "the truth would hurt no one," and of another officer who spoke to the prisoner of his accountability in the hereafter and said: "Why don't you tell it right, you are lying all through." Neither of these statements amounted to such an improper influence as to render the confession inadmissible. *McCleary v. State*, 122 Md. 394; *Rogers v. State*, 89 Md. 424; *Ross v. State*, 67 Md. 286.

A motion was made for an affirmance of the judgment because the appellant's brief was not printed prior to the time when the case was reached for argument, as provided by Rule 36 of this Court, but we are unable to grant the motion as we do not think the ends of justice would be served in a case like the present by a rigid enforcement of the rule.

On account of the action in reference to the defense on the ground of insanity, it will be necessary to reverse the judgment and award a new trial.

*Judgment reversed and new trial awarded.*

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Opinion of the Court.

JUDGE BURKE dissenting: I agree with the principles of law stated in the opinion of the Court, but I cannot concur in the conclusion reached. A careful examination of the Record does not, in my opinion, justify the finding that the appellant was in the slightest degree injured by the action of the trial Court. The defense of insanity was not withdrawn from the consideration of the jury, and it is not shown that that defense was not fully presented and argued to the jury, as the counsel for the appellant had a perfect right to do under the form of the verdict given by the Court. Under that form the jury were at liberty to acquit the appellant upon the ground of insanity, if they found him to be insane at the time of the commission of the crime. Again, there are no facts to warrant the Court, in my judgment, in suspending Rule 36, and the judgment should be affirmed for the failure to comply with that rule.

Upon both grounds indicated the judgment, in my opinion, should be affirmed. I am authorized by JUDGE STOCKBRIDGE to say that he concurs in the views herein expressed.

HARRY P. STRASBAUGH AND WILLIAM SILVER,  
PARTNERS, TRADING AS STRASBAUGH, SILVER & Co.,

vs.

STEWART SANITARY CAN COMPANY OF DELA-  
WARE, MARYLAND AND VIRGINIA,  
A CORPORATION.

*Foreign Corporations: Certificate of Secretary of State; substantial compliance sufficient; filed after suit begun.*

*Amendment to declaration: question whether constitutes new suit. Contracts with agents: damages to principal; special damages; speculative—.*

The certificate of the Secretary of State required by section 93 of Article 23 of the Code of 1912, to the effect that a foreign corporation has complied with all the provisions of the law that are, by the statute, made necessary before such corporation is allowed to do business within the State, is sufficient if it is in substantial compliance with the law. p. 640

The admission of such certificate in evidence can not be successfully objected to, in a suit by such corporation, upon the ground, merely, that it is dated after the date of the institution of the suit or the filing of pleas by the defendant. p. 640

The wrongful admission of evidence is not a reversible error, if it appears that the party excepting to it was not injured by its admission. p. 641

If by an amendment to a declaration a new cause of action is made, then, in considering whether a plea of limitation filed constituted a good defense, the time for the running of the statute is to be taken as extending to the date of such amendment. p. 649

Where the amendment to a declaration involves the same cause of action, on the same consideration, and leaves unchanged the liability of the defendant, it is not to be taken as a change of the cause of action, although in the amendment reference

Md.]

## Syllabus.

is made to a preceding contract upon which the contractors' suit was based, and which preceding contract was not mentioned in the original declaration. pp. 642-643

Where a contract was made with the agents of a corporation, as such agents, so that the agents might maintain an action in their own names to recover damages sustained by their principal for the breach of the contract, such agents in a suit against them brought upon such contract, may recoup for such damages as their principal has sustained. p. 647

When parties have made a contract which one of them has broken, the damages which the other party ought to receive should be such as may fairly and reasonably be considered as arising either naturally—that is, according to the usual course of things—from such breach itself, or, such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of its breach. pp. 648-649

If the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach under the special circumstances so known and communicated. p. 649

If such special circumstances were wholly *unknown* to the party breaking the contract, he, at the most, can only be supposed to have had in his contemplation the amount of injury which would arise generally, and in a great majority of cases, not affected by any special circumstances, for such a breach. p. 649

If the special circumstances had been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be unjust to deprive them. p. 649

In actions *ex contractu*, wherever it is reasonably certain or apparent that profits would have been realized had the contract been completed according to its terms, and the profits of the bargain are the only things purchased or contracted for,

and are the direct and immediate proof of the contract, there, though the *amount* of the profits be open to dispute or controversy, still, such profits as the evidence shows would have resulted but for the breach of the contract by the defendant, are a legitimate element of damages; but whenever it is purely problematical whether any profits would have been realized at all by reason of contingencies which might never happen or where the profits have reference to dependent and collateral engagements entered into on the faith of the performance of the principal contracts, then, without regard to any uncertainty as to mere *amounts*, probable profits can not be recovered because too speculative, indefinite and remote. pp. 649-650

*Decided January 26th, 1916.*

Appeal from the Court of Common Pleas of Baltimore City. (DAWKINS, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*S. A. Williams* and *D. G. McIntosh* (with whom was *Philip H. Close* on the brief), for the appellant.

*Thomas H. Robinson* and *William E. Bonn* (with whom was *Henry A. Whitaker* on the brief), for the appellee.

PATTISON, J., delivered the opinion of the Court.

In this case an action was brought by the appellees against the appellants in the Circuit Court for Harford County, on the 19th day of May, 1908, and was on the 13th day of October, 1913, removed from that Court to the Circuit Court for Baltimore County, and was again removed on the 13th day of April, 1914, to the Court of Common Pleas of Baltimore City, where it was tried before a jury and a verdict was rendered in favor of the plaintiff for the sum of one thousand one hundred dollars (\$1,100.00), upon which a judgment was thereafter entered. It is from that judgment that this appeal is taken.

Md.]

Opinion of the Court.

The first declaration appearing in the record is the amended declaration filed August 9th, 1912. This contained the seven common counts and two special counts. These special counts read as follows:

"8th. For that whereas the said Leonard Steward and John A. Steward, partners trading as L. & J. A. Steward, were on or about the 25th of August, in the year 1906, engaged in the manufacture and sale of tin cans for the packing of fruits and vegetables, and the defendants were engaged in such business as made convenient and necessary the purchase by them of such cans, and the defendants, *on or about the day and date aforesaid*, purchased from said Leonard and John A. Steward, partners, trading as L. & J. A. Steward, forty-three thousand six hundred and fifty (43,650) inch tin cans at a cost of twenty dollars for each and every thousand, and the said Stewards bargained, sold and delivered said cans to said defendants, and whereas, subsequently thereto, to wit, on or about the \* \* \* day of \* \* \* in the year \* \* \* , the said Leonard Steward and John A. Steward, partners as aforesaid, bargained, sold, set over and assigned all their property of every description in the States of Delaware, Maryland and Virginia, including chattels, choses in action, book accounts, business and goodwill to the plaintiff, which then and there became the owner thereof, and although due demand has been made for the payment of the same, the defendants have failed so to do; and

"9th. For that whereas the said Leonard and John A. Steward, partners trading as L. & J. A. Steward, were, on or about the 25th of August, in the year 1906, engaged in the manufacture and sale of certain sanitary capping machines, which were used for the purpose of sealing tin cans used for the packing fruits and vegetables, and the defendants were engaged in such business as made it convenient and necessary for them to purchase or hire such capping machines, and the said defendants, *on or about the day and year*

*aforesaid*, hired from said Leonard and John A. Steward, partners, trading as L. & J. A. Steward, one of said machines at a rental of \$75.00 for the packing season of 1906, and the said Stewards delivered said machine to said defendants for that purpose, and whereas, subsequently thereto, to wit, on or about the \* \* \* day of \* \* \* , in the year \* \* \* , the said Leonard Steward and John A. Steward, partners as aforesaid, bargained, sold, set over and assigned all their property of every description in the State of Delaware, Maryland and Virginia, including choses in action, book accounts, business and good-will, to the plaintiff, including their charge for said rental against the said defendants, which charge then and there became the property of the plaintiff, and although demand has been made for the payment of the same, the defendants have failed so to do."

Upon demand being made, the plaintiff filed the following bill of particulars:

"Shipped August 25th, 1906.

"Harry P. Strasbaugh and William Silver, formerly partners, trading as Strasbaugh, Silver & Company,

To

"The Steward Sanitary Can Company of Delaware, Maryland and Virginia, assignee of L. & J. A. Steward, Dr.

"To 43650 five inch (5 in. x 4¼ in.) sanitary cans at \$20.00 per thousand (purchased August 25th, 1906).....\$873.00

"To hire of one automatic feed double seamer sanitary capping machine for season of 1906. .... 75.00

"Both shipped by L. & J. A. Steward on order and credit of Strasbaugh, Silver & Company, Townsend, Delaware.)

"To interest on same from date of delivery."

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Opinion of the Court.

To the above amended declaration the defendant pleaded:

"(1) That there is no such corporation as the Steward Sanitary Can Company of Delaware, Maryland and Virginia; and (2) that the defendants never promised as alleged; and (3) never were indebted as alleged."

The plaintiff joined issue on the second and third of these pleas, and traversed the first, and thereafter the defendants filed a fourth plea alleging in substance that the plaintiff had not complied with Section 93 of Article 23 of the Code of 1912.

To this plea a replication was entered short upon the docket, and issue joined thereon. In the course of the trial the plaintiff offered in evidence a copy of the certificate of incorporation or charter granted to the plaintiff under the laws of New Jersey, certified to by the Secretary of State of the State of New Jersey, which was admitted without objection. The plaintiff next offered the following certificate:

"The State of Maryland,

"Office of the Secretary of State.

"I, Robert P. Graham, Secretary of State of the State of Maryland, do hereby certify that the Steward Sanitary Can Company of Delaware, Maryland & Virginia, a corporation, created under the laws of the State of New Jersey, has complied with the requirements of section 68 of Article 23 of the Code of Public General Laws of Maryland,\* by filing in this office a duly certified copy of its charter or certificate of incorporation; a certificate, signed by its president, treasurer or a majority of its board of directors, showing its corporate name; the names and addresses of its president, treasurer, secretary and the members of its board of directors; its principal office in this State and in the State of its incorporation; the amount of its capital stock authorized and issued; the number and par value of its shares of stock and the amount

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\*Sec. 68 of Ch. 240 of the Acts of 1908; Sec. 93 of Art. 23 of the Code of 1912.

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paid in thereon; the names and addresses of its shareholders in this State and number of shares of stock held by each; and the amount of capital employed in this State.

"That the said corporation has appointed Mr. Henry A. Whitaker, of Bel Air, Maryland, as its agent to reside in the State of Maryland, upon whom legal process against the corporation may be served, and has certified its willingness that so long as any liability remains outstanding against it in this State, the authority of such agent shall continue until a substitute is appointed and certified to the Secretary of State; and has paid to the State of Maryland the statutory registration fee of twenty-five dollars.

"I, therefore, hereby further certify, that the said corporation is entitled to transact business in the State of Maryland.

"In testimony whereof, I hereunto set my hand and caused to be hereto affixed my official seal, at Annapolis, this 5th day of March, 1915.

"(Seal)

Robert P. Graham,  
"Secretary of State."

The defendants objected to the admission of this certificate in evidence, and the objection being overruled an exception was noted to the ruling of the Court thereon.

Section 93 of Article 23 of the Code of Public General Laws (1912) or sections 137-138 of said Article 23 of the Code of 1904, after the passage of the Acts of 1898, Chapter 270, of this State provides that:

"Every foreign corporation which has a usual office or place of business in this State, \* \* \* shall, before doing business herein, file with the Secretary of State, who shall record the same, (1) a certified copy of its charter or certificate of incorporation; (2) a certificate to be renewed annually before the first day of April in every year, subscribed and sworn to by its president or treasurer, or a majority of its board of

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directors and accompanied by the annual fee of one dollar for recording such renewal, showing (a) the corporate name; (b) the names and addresses of its president, treasurer, secretary and the members of its board of directors; (c) its principal office in this State and in the State of incorporation; (d) the amount of its capital stock authorized and issued, the number and par value of the shares and the amount paid in thereon, and the names and addresses of its shareholders in this State, and the number of shares held by each, and the amount of its capital employed in this State; (e) the name and address of its agent, resident in this State, and authorized to accept service of process upon it; and (f) its willingness that so long as any liability remains outstanding against it in this State, the authority of such agent shall continue until a substitute is appointed and certified to the Secretary of State. At the time of filing the original papers required by this section every such foreign corporation shall pay to the Secretary of State for the use of the State, a fee of twenty-five dollars, *upon receipt of which he shall issue to it the certificate setting forth that it is entitled to do business in this State.*"

And section 94 provides that:

"Every officer of any such foreign corporation which fails to comply with the provisions of the preceding section, and every agent of such non-complying corporation, who transacts business for it in this State, shall be guilty of a misdemeanor and liable to a fine of two hundred dollars. Such failure shall not affect the validity of any contract made with such non-complying corporation, but no suit shall be maintained in any of the courts of this State by any such corporation until it has complied with the requirements of this article."

This certificate was offered under the defendant's fourth plea which alleges that the plaintiffs have not complied with the requirements of said section 93 of the Code. The coun-

sel for the defendants contended, as is disclosed by the record, that, by the introduction of this certificate in evidence, the judgment of the Secretary of State was improperly substituted for that of the Court in determining the question whether or not this section of the Code had been complied with by the plaintiff corporation, and insisted that the papers filed with the Secretary of State, properly certified to by him, and not such certificate, should have been offered in evidence to show a compliance with the statute.

It is one of the requirements of the statute that the Secretary of State shall, as evidence of a compliance therewith, issue to the corporation a certificate setting forth that it is entitled to do business in this State when it has done those things which are required of it by the statute.

The certificate in this case is a substantial compliance with this provision of the statute, and, we think, is admissible in evidence, without the introduction of the papers themselves, from which the certificate is made. It is true that the certificate is dated after the filing of the plea, but this, we think, is immaterial in view of the decision of this Court in the case of *Kendrick & Roberts v. Warren Brothers*, 110 Md. 47. In that case the defendant had not, at the time of the institution of the suit, complied with section 137 of said article of the Code of 1904, containing provisions similar to those found in section 93 of the present Code, but thereafter during the progress of the suit complied with such provisions of the statute.

It was contended by the defendant that the suit could not be maintained because of the provision contained in section 140, that, "no such foreign corporation shall be permitted to maintain any action either at law or equity in the Courts of this State until the provisions of section 137 shall have been complied with." But this Court held that the plaintiff was not "prohibited from prosecuting and maintaining its suit after a compliance \* \* \* after the institution of the suit." What was there said of that case, applies, we think, to the facts of this case and thus we find no error in the rulings

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of the Court below in admitting such certificate in evidence.

The second exception was to the action of the Court in permitting the witness for the plaintiff to state that the market value of the cans sold was twenty dollars per thousand, the price at which the declaration alleges the cans were sold. The admission of this testimony could not have injured the defendants, even should it be regarded as wrongfully admitted.

George H. Steward, a witness for the plaintiff, was asked upon cross-examination: "Q. The cans which were shipped August 25th to which you have read the bill, when were they ordered? A. I understand that they were included in the contract of May 4th." The plaintiff then moved "to strike out the evidence already offered in reference to goods alleged to have been sold on August 25th." In passing upon this motion the Court addressing the counsel for the plaintiff said "the idea of it is that you have distinctly declared upon the sale made August, 1906, if there was anything leading up to that—if there was a prior sale or that was a consummation of a previous contract, there was nothing in the declaration to show that." Whereupon the plaintiff asked and obtained leave to amend its declaration by interlining in both the eighth and ninth counts the words "and prior thereto" and by striking therefrom the words "on or about the day or date aforesaid" and inserted in lieu thereof, "in pursuance of a contract dated May 4th, 1906." The counts when so amended read as follows:

"8th. For that whereas the said Leonard Steward and John A. Steward, partners trading as L. & J. A. Steward, were on or about the 25th day of August, in the year 1906, *and prior thereto*, engaged in the manufacture and sale of tin cans for the packing of fruits and vegetables, and the defendants were engaged in such business, as made convenient and necessary the purchase by them of such cans, and the defendants *in pursuance of a contract dated May 4th, 1906*, purchased from," &c.

"9th. For that whereas the said Leonard and John A. Steward, partners trading as L. & J. A. Steward, were, on or about the 25th day of August, in the year 1906, and prior thereto, engaged in the manufacture and sale of certain sanitary capping machines which were used for the purpose of sealing tin cans used for the packing fruits and vegetables, and the defendants were engaged in such business as made it convenient and necessary for them to purchase or hire such capping machines, and the said defendants, in pursuance of a contract dated the 4th day of May, hired from the said Leonard and John A. Steward," &c.

The bill of particulars was also amended by striking therefrom the italicized word "purchased" and inserting in lieu thereof the word "shipped."

Upon the filing of the amended declaration the defendant filed pleas of limitation to the amended eighth and ninth counts, which, upon motion of the plaintiff, were not received by the Court. It is the contention of the defendant that the declaration as amended contains a new cause of action, and that the pleas of limitation were at such time properly pleaded thereto, and should have been received by the Court. If by such amendment a new cause of action was set up, the contention of the defendant, no doubt, is correct by the decisions of this Court. *Schulze v. Fox*, 53 Md. 37; *Wolf v. Bauereis*, 72 Md. 481; *W. U. Tel. Co. v. State, use of Nelson*, 82 Md. 293; *Hamilton v. Thirston*, 94 Md. 253; *Zier v. Chesapeake Railway Co.*, 98 Md. 35; *Di Giorgio Co. v. Stock*, 116 Md. 201; *Schuck v. Bramble*, 122 Md. 411; *Spencer v. B. & O. R. R. Co.*, 126 Md. 194. But in our opinion the cause of action is the same as that found in the preceding amended declaration.

The plaintiff by the eighth count of the first amended declaration seeks to recover the purchase price of 43,650 cans purchased, as the declaration alleges, by the defendant from L. & J. A. Steward, assignors of the plaintiff, on or about

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August 25th, 1906, at the stipulated sum of twenty dollars per thousand.

In the eighth count of the declaration as amended, the plaintiff seeks to recover the purchase price for the same number and size of cans at the same price per thousand, and bought from the same parties, although it does not allege therein that such purchase was made on or about the 25th day of August, but alleges it was made in pursuance of a contract dated May 4th, 1906, although as disclosed by the evidence in the case the cans were not shipped until the 25th day of August, 1906.

The cases of *Hamilton v. Thirston*, *supra*, and *Di Giorgio Co. v. Stock*, *supra*, where it was held that the cause of action was changed, or a new cause of action set up by the amended declaration, were both cases where the form of action was changed by such amendment, and in the more recent case of *Schuck v. Bramble*, *supra*, where it was also held that the amended declaration contained a new cause of action, the amendment changed the liability of the defendant, but in this case neither the liability or the form of action is changed by the amendment to the declaration, and the consideration was the same.

The fact that the contract of May 4th, 1906, was not mentioned in the first amended declaration, pursuant to which the goods were thereafter delivered on or about August 25th, 1906, cannot, we think, have the effect of changing the cause of action. It is nevertheless one and the same cause of action, and should be so treated.

What we have said of the eighth amended count also applies to the ninth.

After amending the declaration the following contract was then offered in evidence:

"Aberdeen, Md., May 4th, 1906.

"Bought of L. & J. A. Steward, Rutland, Vt., one carload of five and one-half inch (5½ in. x 4¼ in.) sanitary cans at \$23.00 per thousand, and one carload of five inch (5 in. x 4¼ in.) sanitary cans at \$20.00

per thousand, F. O. B., Rutland, Vt. To be shipped before June 15th, 1906, at option of seller.

"Terms: Cash as soon as cans are unloaded in factory, and count found to be correct.

"All cans (except two to the thousand) guaranteed against leaks from imperfect manufacture.

"Ship to Wright Canning Co., Townsend, Delaware, P. R. R., c/o Del. Div. at Wilmington, Del.

"The said Stewards agree to furnish us with one of their automatic feed 'double seamers' (adjustable for both the above sizes) for closing the above cans, at a rental of \$75.00 for the season of 1906, and if we want to buy the said machine at the end of the season (Oct. 15th) we may do so for the sum of \$450 less the \$75. already paid for rent.

"(Signed) Strasbaugh, Silver & Co.,  
"Purchasers."

The counsel for the appellants, in the trial of the case below took the position that the appellants were, in the matter of the above contract, factors of the Wright Canning Company, as shown by the facts of the case, including the agreement between them and said Company, and that as such factors, "they could sue upon the contract for its breach as though they were principals, or, in a suit for the price of the goods under the contract, they could recoup all damages sustained by the breach of the contract; whether to their principal or to themselves," and so offered evidence tending to show that their principal, the Wright Canning Company, had sustained damage by the breach of the contract on the part of the plaintiff. But the Court below refused to admit such evidence, and confined the defendants to the proof of such damage as was sustained by them, as principal.

In the case of *U. S. Telegraph Co. v. Gildersleve*, 29 Md. 246, the suit was brought to recover damages resulting from the appellant's failure to transmit a telegraphic dispatch to Dibble & Cambloss, stock brokers in New York. The dispatch, directing the sale of gold, was signed by Gildersleve,

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the appellee, a stock broker in Baltimore City. A. B. Patterson, also a broker in Baltimore, was appellee's customer, for whom the appellee was in the habit as broker, of buying and selling gold and stock in New York, through the agency of Dibble & Cambloss. That, by arrangement previously made between appellee and Patterson, for the purpose of saving trouble to them both, instead of Patterson being required to give orders to the appellee for such purchases and sales, and the appellee being required to send them to his correspondents, Patterson was authorized to send orders in the appellee's name, and on his responsibility and account, to Dibble & Cambloss, for the purchase or sale of stock or gold; and that, by this arrangement, the appellee was entitled to his commissions on purchases and sales made in compliance with such orders, and the rights and liabilities of the appellee and Patterson respectively, in reference to the orders so sent, were in all respects the same as if Patterson had given the orders to the appellee, and the latter had transmitted or undertaken to transmit them to Dibble & Cambloss, in his own name; Patterson not being known to, and having no connection with Dibble & Cambloss, except through the appellee. That, under said arrangement, on the 9th March, 1865, at about 3:40 P. M., the message in question, addressed to Dibble & Cambloss, was left by Patterson's direction, at appellant's office, in Baltimore, and that the appellant, by its agents, undertook to send and deliver it to the parties to whom it was addressed. That the message was sent to the office without the knowledge or special direction of the appellee, but that he was soon after informed of it, and fully sanctioned it. It was also shown that appellee had, on the day of the date of the message, \$200,000 of gold to his credit with Dibble & Cambloss, and of that sum, as between appellee and Patterson, \$95,000 belonged to the latter.

One of the questions raised in that case was whether the appellee, Gildersleve, could maintain the action, and recover more than nominal damages for the default of the appellant.

The Court said: "Upon such state of facts, the appellee was clearly the agent of Patterson, and, as such agent, held and controlled the gold of his principal. It was embraced in the appellee's account, and he had credit for it, in the books of his correspondent, and no other person than himself could have withdrawn it or disposed of it. And, apart from the fact that he had a special property or interest in the gold of his principal thus at his disposal, he was beneficially interested, at the time of the order given, to the extent of commissions on the sale. And where an agent is thus interested, as for commissions, or by reason of special property in the subject-matter, and the contract, in reference thereto, is made in his name, it is perfectly competent for him to sue and maintain an action in his own name, as if he were the principal. \* \* \* And if, in the instances mentioned, the agent can sue and recover the full measure of damages, we can see no reason why the appellee, looking to his relation to this transaction, may not recover the full amount of damages resulting from a breach of the contract with the appellant. He, of course, sues and recovers as trustee for his principal."

The principle laid down in the above case applies, we think, to the facts of this case.

The firm of Strasbaugh, Silver & Co. at the time of the execution of the contract was composed of Harry P. Strasbaugh and William Silver, the defendants in this case; Harry P. Strasbaugh was also president of the Wright Canning Company, which was operating a canning factory in Townsend, Delaware, and with William Silver owned forty-nine per cent of the stock. George E. Wright was its treasurer and manager, and the owner of most of the remaining stock. All of these gentlemen lived in or near Aberdeen, Harford County, Maryland. The firm of L. & J. A. Steward was represented by George W. Evans, also a resident of Aberdeen, with whom Messrs. Strasbaugh & Wright and others associated with them in the Wright Canning Company, had been negotiating for months prior to the execution of the con-

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tract, for the purchase of sanitary cans and the hiring of the machine with which the tops were fastened and crimped upon such cans, and from whom they finally agreed to purchase the number of cans mentioned in the contract, and to hire a machine from L. & J. A. Steward, through Mr. Evans, their agent; and the contract therefor was accordingly written to be executed by the Wright Canning Company and the vendors, but when presented to them—the officials of the Wright Canning Company—the terms of payment provided for sight draft against bill of lading. These terms were objected to because they afforded no opportunity to inspect the cans before paying for them.

Evans, however, said that because the Wright Canning Company was not known to the sellers, they were unwilling to accept other terms of payment. Mr. Strasbaugh then suggested to Mr. Evans that they would buy the cans from L. & J. A. Steward “for the Wright Canning Company” if the sellers would ship the cans on their account. This proposition was accepted and the above contract was written and executed.

The record also discloses that the defendants had a contract with the Wright Canning Company that was in force in the year 1906, by which they were to furnish certain supplies and materials, and advance money, to said Company to be used in the operation of its factory, and the Company was to place with the defendants for sale its entire pack of canned goods, and out of the proceeds of the sale they were to reimburse themselves for supplies and money furnished and advanced by them.

Upon the facts as stated, the defendants were the agents of the Wright Canning Company, and as such could maintain an action, brought in their own name, to recover damages sustained by their principal in consequence of a breach of the aforesaid contract, and as they could maintain such action when instituted by them, they can, in a suit against them, brought upon the contract, recoup for such damages.

The defendants offered evidence tending to show that relying upon the contract made with the plaintiff, the Wright Canning Company, through the defendants, sold tomatoes packed in sanitary cans such as those purchased under the contract, to be delivered in the future, at a stipulated sum, and that owing to the default of the plaintiff in complying with the terms of their contract aforesaid, the Wright Canning Company was unable to comply with the contract so made by it with goods packed by them in such sanitary cans, and was thus forced upon the market and required to purchase the goods of the character sold, with which to fill such contracts, at a sum far in excess of the price at which they had sold, and greatly in excess of the cost to them of packing such goods if the contract had been complied with on the part of the plaintiff, and they had been able to pack the same.

The Court refused to admit this and other evidence tending to show that the Wright Canning Company had sustained loss or damage by the failure of the plaintiff to comply with the terms of the aforesaid contract of May 4th, 1906, and would not permit the defendants to develop this line of defense, but confined them, as we have said, to the proof of such loss as was sustained by them as principals.

The Court in so ruling committed an error, and because of such error the judgment below will be reversed, and a new trial awarded, and, therefore, as the case is to be again tried, we will state the well established rule of law applicable to cases of this character.

In *Winslow Elevator Co. v. Hoffman*, 107 Md. 621, JUDGE BURKE, speaking for the Court and quoting from the case of *Hadley v. Baxendale*, 9 Exch. 341, said: "When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or, such as may reasonably be supposed to have

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*been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made, were communicated by the plaintiff to the defendant, and thus known to both parties, the damage resulting from the breach of such contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly known to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, for such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them."* Webster v. Woolford, 81 Md. 329; U. S. Telegraph Co. v. Gildersleve, *supra*.

As to profits, and when the loss of same may be recovered as damages, this Court said in *Lanahan v. Heaver*, 79 Md. 418, speaking through JUDGE McSHERRY that "in actions *ex contractu* it may be said that wherever it is reasonably certain or apparent that profits would have been realized had the contract been completed according to its terms, and the profits of the bargain are the only things purchased or contracted for, and are the direct and immediate proof of the contract, there, though the *amount* of the profits be open to dispute or controversy, still, such profits as the evidence shows would have resulted but for the breach of the contract by the defendant, are a legitimate element of damages; but whenever it is purely problematical whether any profits would have been realized at all by reason of contingences which might never happen or where the profits have reference to dependent and collateral engagements entered into on the faith of the performance of the principal contract, there,

without regard to any uncertainty as to mere *amounts* probable profits cannot be recovered because too speculative, indefinite, and remote."

The defendants' first and second prayers, we think, were properly refused for the reasons already stated in holding that the ruling of the Court was correct in the admission of the certificate of the Secretary of State, and we find no error in the ruling of the Court in the granting of the defendant's seventh prayer as modified, but inasmuch as the granted prayer of the plaintiff and the other rejected prayers of the defendant as well as the prayer granted at the instance of the Court, were all granted upon the facts of the case then before the Court, not including the facts we say should have been admitted, it can serve no useful purpose in the retrial of this case to further pass upon the rulings of the Court thereon, and in view of what we have said as to the defendant's right to recoup for losses sustained by the Wright Canning Company, as their principal, by reason of the breach of the contract aforesaid, we deem it unnecessary to pass upon the exceptions to the testimony, except as to the seventh. This exception was to the action of the Court in refusing to admit in evidence a contract for the sale of tomatoes made by the defendants, March 20th, 1906. This, we think, was properly excluded, as it does not sufficiently appear from the record that the subsequent contract of May 4th, 1906, was executed to enable the defendants to comply with this contract and that knowledge of such purpose was imputable to the plaintiff.

The judgment of the Court below will be reversed.

*Judgment reversed and new trial awarded,  
with costs to the appellants.*

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Syllabus.

STATE OF MARYLAND, USE OF LENA B. CULLEN,  
WIDOW, AND EMILY MATILDA CULLEN, INFANT, ETC.,*vs.*

N. Y., PHILA., &amp; NORFOLK R. R. CO.

*Negligence: Railroad tracks; duty of persons crossing—.*

Well defined and imperative duties are imposed upon persons before they attempt to cross the tracks of a railroad company.

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One about to cross the tracks of a railroad is bound, under all circumstances, to look and listen for approaching trains, and if the crossing is one of more than ordinary danger, and the view of the tracks is obstructed, at or near the place of crossing, it is the duty of the traveler to *stop, look and listen*, before he attempts to cross.

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If a person neglects these necessary precautions, and in consequence of such neglect is injured by collision with a passing train, he will be held to have contributed by his own negligence to the occurrence of the accident, and is thereby precluded from recovering for such injury.

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A person, approaching a railroad crossing on a bicycle, while the tracks were partially concealed by standing cars, and, not heeding the ringing of the bell of an approaching train, continued his way, without pausing or stopping to look or listen, and was run into and killed: *Held*, there could be no recovery against the railroad company.

pp. 657-659

Where there is no evidence to show that the employees of a railroad company had seen the position of danger in which a person, on or about to cross the tracks, had negligently placed himself, the plaintiffs suing the railroad company for damages for the death of such party, can not invoke the doctrine that, in spite of the contributory negligence of the party, the defendant company was liable.

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*Decided February 9th, 1916.*

Appeal from the Circuit Court for Somerset County.  
(STANFORD, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Alonzo L. Miles* (with whom was *H. Fillmore Lankford* on the brief), for the appellants.

*George Myers* (with whom was *Joshua W. Miles* on the brief), for the appellee.

PATTISON, J., delivered the opinion of the Court.

The appellants, the widow and infant child of Frederick Cullen, brought suit against the appellee in the Circuit Court for Somerset County, to recover damages for the death of the said Frederick Cullen, resulting, as alleged, from the negligence of the defendant company.

On the afternoon of September 20th, 1913, Frederick Cullen, while riding on a bicycle upon one of the streets or highways of the town of Crisfield, Somerset County, Maryland, attempted to cross the tracks of the appellee and was struck and killed by one of its moving trains.

The defendant company owns and operates a branch road running from Kings Creek in Somerset County, a station upon the main line of its road, to and through the town of Crisfield. Its general direction in entering and passing through said town is from northeast to southwest. The place at which the accident occurred was near the terminus and the yard of the company, and at such place there was a switch on the southeast side of the main track of the defendant's road, starting at a point northeast of said street and extending across it to a point some distance southwest of it. On the occasion of the accident there was upon this switch a number of cars belonging to a circus then visiting the town.

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These cars were on both sides of the street, leaving only an open space of eighteen or twenty feet, the width of the street, between them. This was done to permit those traveling upon the street to cross the defendant's tracks at this point.

The train by which Cullen was killed was made up of three cars, engine and tender, and was at the time of the accident backing down to the yard with the tender at the head of the train.

George Whittington, a witness for the plaintiff, testified that just prior to the time the accident occurred, he was seated on his wagon upon said street or highway, fifteen or twenty yards to the southeast of said crossing awaiting the train to pass. The train at this time was moving slowly from the northeast towards the crossing, and the bell upon the engine was ringing. It was because of the ringing of the bell that he had stopped to await the passing of the train. That while so waiting, Cullen rode by him on his bicycle going towards the crossing and without stopping "he attempted to pass over, and time he got on the crossing the train was coming down and he come into collision, and seeing he could not rescue himself he tried to turn his front wheel, and he caught hold, trying to rescue himself, he caught hold of a part of the car, and it struck him down, and the wheel remained there, and when I leaped from my wagon, I leaped from my wagon and run to see what the end would be, as the car was coming down, and I seen between—that he was contending for his life and holding on, and he continued on, and finally at last I saw him drop. He could not hold on any longer." Upon cross-examination the witness was asked: "Q. Did Cullen ever stop until he got on part of the main track? A. No, sir; in my judgment he never stopped at all. Q. He was on the track itself the train was on before he ever stopped? A. Yes, sir; it seemed he was, and when he saw he could not make his escape across, it seemed as though he made an attempt to turn his wheel, and managed to strike the side of the track that the car was going

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down on and when he struck it is bounced him up, and then to rescue himself he grabbed for the cars, she was coming to him, and then the wheel he was sitting on kind of tangled him and he continued to hold there until she dragged him a certain distance, and until he was compelled to break his hold."

The only other witness who saw the accident was Mrs. Margaret Tyler, a witness produced by the plaintiff, who testified, that she at the time of the accident was standing in the door of her house, which is located on the northwest side of the railroad track and on the southwest side of, and 133 feet from, the aforesaid street or highway, and faces the tracks of the company. She was asked the question: "State to the jury in your own way just what you saw when you were standing in your doorway and the train approached? A. When I first went to the door, I saw a man thrown over his wheel. He just went up and came down, and it looked—he grabbed hold of the tender and tried to hold it and it dragged him in foremost, and then when he was dragged under, when he must have let go, after turning him over, and I could not see any more of him at all until he got in near half way, to the cars and then he dropped down." She further testified that she screamed and waved her apron in an attempt to attract the attention of the engineer and fireman upon the engine. This was while Cullen, as she says, was clinging to the tender which was at the time about half way from the crossing to a point in front of her house, but she could not make herself heard. She then ran out and threw up her apron, and finally attracted the attention of the engineer and fireman, and, as she says, "the train stopped immediately." She also testified that she heard the bell ringing on the engine, and that at such time the train was moving slowly.

Warren Gundy, a witness for the plaintiff, testified that he was at the place of the accident shortly after it occurred, and saw the body of Cullen lying at a point about opposite Mrs. Tyler's house. That he examined the track between

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that place and the crossing, and found blood at a point ten or fifteen feet from the body in the direction of the crossing.

William Pennell, the conductor, who was called as a witness by the plaintiff, testified that the train on the occasion of the accident when approaching the crossing referred to, was, in his judgment, going about four miles an hour.

At the conclusion of the testimony the case was withdrawn from the consideration of the jury upon the prayer of the defendant "that under the pleadings and evidence in this case, there is no legally sufficient evidence to entitle the plaintiff to recover."

The view of the track was no doubt greatly obstructed by the cars upon the switch, when approached from the south-east, but this fact did not lessen the care and caution to be exercised by Cullen in crossing it, but on the contrary, imposed upon him greater care and caution in approaching and crossing the same.

This Court, speaking through JUDGE BURKE, in *Manfuso v. Western Md. R. Co.*, 102 Md. 257, said: "By the settled law of this State certain well-defined and imperative duties are imposed upon persons before they make the attempt to cross the tracks of a railroad company.

They are bound under all circumstances to look and listen for approaching trains, and if the crossing is one of more than ordinary danger and the view of the tracks is obstructed at, or near the place of crossing, it is the duty of the traveller to *stop, look and listen*, before he attempts to cross, and if a person neglects these necessary precautions, and in consequence of such neglect is injured by the collision with a passing train, he will be held to have contributed by his own negligence to the occurrence of the accident, and will not be allowed to recover for any injury he may have sustained."

Both George Whittington and Mrs. Tyler heard the bell ringing upon the moving engine, the former at a distance of at least fifteen or twenty yards and the latter fifty or more yards from the crossing. It is not shown that Cullen heard

the bell, but it is disclosed by the evidence that he at no time after being first seen by Whittington, ever stopped to listen for any signal or warning of danger.

It may have been that Cullen could not have seen the moving train until he had reached a point within a few feet of the tracks. He was, however, riding upon a bicycle, and at this point he could easily have stopped and dismounted and there looked and listened for an approaching train, which, as shown by the evidence, he failed to do, but rushed headlong into the passing train, meeting his death in the manner prescribed in the testimony above stated.

In the case of *Robertson v. Pennsylvania R. R. Co.*, 180 Pa. 43, 36 Atl. Rep. 403, the decedent was riding a bicycle, and when he came to the defendant's road which at that point had four tracks, a freight train was passing, for which he had to wait. He did not dismount, but made what the appellant called "a bicycler's stop," circling on his wheel around and around for a distance of five or ten yards from the track, and when the freight train had passed, he started across without dismounting, and was struck by a train coming in the opposite direction on another track. The Court there said: "Passing by the questions raised as to ability to see the coming train from other points, it is admitted that, before reaching a position of actual danger, there was a space of not less than seven feet between the tool house and the nearest track, from which an unobstructed view of the train could have been had. It was the duty of the deceased to stop there and to dismount in order to make a stop effective for the purpose of looking and listening. \* \* \* The general rule to be applied requires that a bicycler must dismount, or, at least, bring his wheel to such a stop as will enable him to look up and down the tracks and listen in the manner required of a pedestrian."

It is clear, we think, from the evidence that Cullen contributed by his own negligence to the occurrence of the accident resulting in his death.

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It is, however, contended by the defendant that because of the increased danger to travellers upon said street or highway at the aforesaid crossing, caused by the cars being upon the switch, a greater duty was imposed upon the defendant in notifying such travellers of the danger incident to the crossing of its tracks at such point, and that it negligently failed to perform the greater duty so imposed upon it. It is unnecessary for us to consider and decide this question, for should it be held that the defendant was negligent as claimed by the plaintiffs, they, nevertheless, would not be entitled to recover, because of the contributory negligence of Cullen in entering upon the tracks of the defendant company in the manner described above. *United Electric and Railway Company v. Durham*, 117 Md. 192; *McNab v. Railway Company*, 94 Md. 719; *Heying v. United Electric Ry. Co.*, 100 Md. 281; *State Use of Silver v. P. B. & W. R. R. Co.*, 120 Md. 70.

A similar contention was made in the case of *Passman v. West Jersey & Seashore R. R. Co.*, 68 N. J. L. 719; 54 Atl. Rep. 809. In that case an action was brought by the administratrix of William Passman to recover damages for his death which was caused by one of the engines of the defendant company colliding with him as he was attempting to cross its tracks on Ohio avenue in Atlantic City on a bicycle. At the time of the accident the Railroad Company had four tracks across the avenue upon which the decedent was riding. The two nearest the deceased as he approached the crossing were side tracks used for the shifting and storing of cars. Beyond these were the two regular express or incoming and outgoing tracks. Just prior to the accident a train of empty cars had been placed upon the side track. This train had been cut, leaving some cars to the east and some to the west of the avenue; thus permitting passage over the avenue for vehicles and pedestrians. The decedent as in this case proceeded to cross the tracks of the defendant company without exercising the care and caution required of him and was killed.

It was contended by the counsel for the plaintiff that the empty cars left on the side track obstructed the view of the incoming train, and that none of the statutory signals were given by the defendant of the approach of its train, and therefore it was liable in damages for his death. The Court there said: "No negligence, however, on the part of the railroad employes, would excuse the plaintiff's intestate from exercising reasonable and ordinary care in approaching this crossing, which was a place of obvious and known danger, so that his failure to observe such care would preclude the plaintiff's right of recovery. The cutting of the train was not an invitation to cross without exercising reasonable care. It was only for the purpose of furnishing an opportunity to those who might desire to cross while using the ordinary prudence required by the law under the circumstances apparent from the condition of the crossing. The absence of the statutory signals did not justify the deceased in assuming that it was safe for him to cross. He should have used reasonable care for his own preservation, and, failing therein, he cannot shift the sole responsibility upon the company. If by taking ordinary care he could have avoided the danger, his failure to do so negatives the plaintiff's right of recovery. One cannot recover for the breach of duty of another when he is lacking in ordinary prudence himself."

The plaintiffs also relied on what is sometimes called "Negligence in the Third Degree," and contended that the case should have gone to the jury on the evidence offered as to whether the company's agents could have, by the exercise of reasonable diligence, avoided the consequence of Cullen's negligence in attempting to cross the tracks of the defendant company.

The doctrine here invoked presupposes that the defendant's employees knew, or by the use of due care could have known, of the peril in which the injured party had, by his own negligence placed himself; and that they either knew or could have known of that peril in time to avert the injury. *McNab v. Railway Company, supra*.

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When shown that the deceased was guilty of contributory negligence in attempting to cross the tracks under the circumstances related, the burden was shifted and the plaintiffs were required to show that the defendant's employees were guilty of negligence in not avoiding the accident, notwithstanding the negligence of the deceased: *State, use of Silver, v. P., B. & W. R. R. Co., supra.*

There is, we think, no evidence to go to the jury, tending to show that Cullen was seen or could have been seen by the employees of the defendant company, in the position of peril, upon the tracks of the defendant, in which he had placed himself by his own negligence, or that they knew or could have known of his position of peril in time to have avoided the consequences of his said negligent act. The first intimation they had of his perilous position, as far as the record discloses, was when their attention was called thereto by Mrs. Tyler, when, as she says, the train was "immediately stopped."

It is clear to us that the last negligent act was the act of Cullen in attempting to cross the track in the manner in which he did, and the doctrine here sought to be applied is only applicable when the defendant's negligence in not avoiding the consequences of the plaintiff's or deceased's negligence is the *last* negligent act. It can never be invoked when the plaintiff's or the deceased's own act is the final negligent act. *McNab v. United Rys. Co., supra.*

In view of what we have said it is not necessary for us to pass upon the exceptions to the testimony, as the conclusion reached by us would not be affected by the admission of such excluded testimony. The judgment below will be affirmed.

*Judgment affirmed, with costs to the appellee.*

THE UNITED RAILWAYS AND ELECTRIC  
COMPANY OF BALTIMORE

vs.

THE MAYOR AND CITY COUNCIL OF  
BALTIMORE.\*

*Constitutional law: section 48 of Article 3; amending or repealing charters of corporations; limitations of power. United Railways of Baltimore City: paving between tracks; special assessment for repaving; illegal—where no special benefit.*

The amendment to the State Constitution now known as section 48 of Article 3, to alter, repeal or amend the charters of corporations, does not confer unlimited power upon the State; it was not intended to deprive the citizen of his property contrary to the law of the land, or to take private property for public use without just compensation. p. 673

To charge the United Railways of Baltimore City for the repaving of the streets, between and for two feet on each side of its tracks, when its charter provisions require it merely to keep such parts of streets in repair, is an illegal act, and can not be sustained under the amending power reserved in the Constitution, or any other power under the laws of Maryland. p. 674

The assessing of such special assessment upon the street railway is an attempted exercise of the taxing power for a public work which conferred no special benefit upon the corporation. p. 673

Every special assessment for public improvements, where there are no special benefits conferred, is wrong, and if consummated is nothing more than the confiscation of private property for public use without compensation. pp. 670-671

*Decided February 10th, 1916.*

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\*An application was made by the appellee, in this case, to the Supreme Court of the United States for a writ of *certiorari*. The writ was denied May 8th, 1916.

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Opinion of the Court.

Appeal from the Superior Court of Baltimore City. (SO-  
PER, C. J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE,  
BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CON-  
STABLE, JJ.

*Joseph C. France* and *Sylvan Hayes Lauchheimer*, for the  
appellant.

*S. S. Field*, the *City Solicitor*, for the appellee.

BURKE, J., delivered the opinion of the Court.

This is the defendant's appeal from a judgment for twenty-two thousand, four hundred and forty-nine dollars and fifty-six cents entered against it in the Superior Court of Baltimore City. The suit was brought under the Act of 1914, Chapter 37, to recover from the defendant the amount paid by the Mayor and City Council of Baltimore for paving, as shown upon the account filed with the declaration, the area between and for two feet on each side of the defendant's tracks on Baltimore street, from Fremont to Liberty streets, in Baltimore City.

There is no question of pleading involved, and it is admitted that the account is correct and shows the sum paid by the City for doing the work. The single question in the case is one of law. The case was tried in the Court below without the intervention of a jury, and that Court, treating the question as one arising under the Federal Constitution, held that the Act did not violate the provisions of that Constitution, and, resting its judgment principally upon the case of *Fair Haven and Westville Railroad Co. v. City of New Haven*, 203 U. S. 379 (51 Law Ed.), held the defendant liable.

In the briefs of the parties the Federal question is exhaustively and ably discussed and many decisions from the Supreme Court of the United States and elsewhere are cited

in support of the conflicting contentions. After the most careful consideration of the case we do not find it necessary to pass upon the Federal question suggested in the briefs, but we rest the decision solely upon the Constitution and decisions of our Court. In order that the basis and extent of the decision may be clearly understood, and that the real issue before the Court be not overladen and obscured by a mass of adjudications from other jurisdictions, based either upon dissimilar facts or upon principles of law which do not obtain in this State, it is necessary to state the controlling facts disclosed by the record and the single question which it presents.

By Ordinance No. 44, approved March 28, 1859, William H. Travers and certain associates were empowered to construct a passenger railway on Baltimore and other streets in Baltimore City. Section 9 of the Ordinance provided: "That if the aforesaid parties, their associates, successors or assigns, shall hereafter become incorporated, the rights and privileges granted to them by virtue of this ordinance shall extend to such corporation upon the conditions herein prescribed, and until such acts of incorporation shall have been obtained, such association shall have all the rights and privileges hereby granted, or the successors of said parties; without further action of the Mayor and City Council of Baltimore." It was provided by section 11 of the Ordinance, "that the owners and proprietors of said railways shall keep the streets covered by said tracks, and extending two feet on the outer limits of either side of said tracks in thorough repair, at their own expense, and shall free the same from snow or other obstructions, in doing which they shall not cause to be obstructed the other portions of the street on either side of the railway tracks authorized by this Ordinance to be constructed, and for non-compliance, the Mayor and City Council may impose such reasonable fines, not exceeding twenty dollars per square, to be collected as other city fines are now col-

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lected." The Ordinance contained other provisions which have no controlling effect in this case.

William H. Travers and his associates assigned all the rights, powers and privileges granted under the Ordinance to Henry Tyson and others, and by the Act of 1862, Chapter 71, Henry Tyson and others were incorporated by the name and style of the Baltimore City Passenger Railway Company. The corporation thus created was vested with all the rights, powers and privileges granted by the above-mentioned Ordinance to William H. Travers and others, "to be by said corporation held, enforced and exercised in manner and form and upon the terms and conditions, and subject to the restrictions and limitations contained in the Ordinance." It was further provided that upon the acceptance of the Act by Tyson and his associates, "all railways, railway cars, horses, and other property of every description, real, personal and mixed, acquired and held by them for the purposes mentioned in and to carry out the provisions of the aforesaid Ordinance shall be and they are hereby vested in said corporation." Section 12 expressly reserved to the General Assembly "the power at all times to repeal, alter, or amend this charter." As to this section it may be said it reserved no new power to the General Assembly. It was merely a declaration or reservation of a power already vested in it by the Constitution of 1851 (Article 3, section 47).

The United Railways and Electric Company, the defendant in this action, was formed in 1899, and by a certificate of consolidation and the Act of 1900, Chapter 319, all the rights and powers, duties and obligations, existing at the time of the consolidation, granted and imposed by law or ordinance to and upon the Baltimore City Passenger Railway Company were vested in and assumed by the defendant. It was under an obligation imposed by the Ordinance of 1859 to keep the streets covered by its tracks and extending two feet on the outer limits of either side of said tracks in thorough repair, at its own expense. Its charter was subject

to the reserve power to repeal, alter, or amend contained in the Act of 1862, Chapter 71, and to the provisions of section 48, Article 3 of the Constitution of 1867, as follows: "All charters granted or adopted in pursuance of this section, and all charters heretofore granted and created subject to repeal and modification, may be altered from time to time, or repealed."

By Ordinance No. 9, approved December 9, 1897, the duty of paving and repairing the railway area was imposed upon street railway companies where rights or privileges were *thereafter* granted to such companies to use or occupy the streets of Baltimore. All grants which have been made to the defendant company since its formation have been made subject to the paving and repairing obligations imposed by the Ordinance of 1897, and subject also to the payment of the park tax and other charges fixed by the Board of Estimates under the City Charter. As to this Ordinance and the charges fixed by the Board of Estimates no question is raised in this case. The obligations to pave and repair where tracks have been laid under that Ordinance have been assumed by the defendant, and it has paid the park tax since its formation,—a sum amounting to more than six million, seven hundred thousand dollars—all franchise charges, and general taxes and other costs, aggregating large sums, in adapting and adjusting its tracks to paving operations.

The Act of 1906, Chapter 401, created a Paving Commission for Baltimore City, and by the amendment thereto made by the Act of 1908, Chapter 202, broad powers as to the paving and repairing the city streets with new and improved street material were conferred upon the commission, and in order to provide the money for doing the work to be done by the commission the Mayor and City Council was authorized to issue the stock of the corporation to an amount not exceeding five million dollars. This loan was approved by the voters of Baltimore in 1911. The Commission was organized and began the work of paving the streets of the City.

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The second section of the Act of 1908, Chapter 202, authorized the Commission at its election to assess the cost of the paving, etc., "in whole or in part, upon the property binding upon such public lanes, avenues, streets or highways, according to such mode of procedure as shall be prescribed by the Mayor and City Council of Baltimore by ordinance or ordinances." The prior Act (1906) imposed one-third of the costs upon the City and two-thirds upon the abutting property owners, and by section 8 of that Act it was provided: "That the Mayor and City Council of Baltimore be and it is hereby likewise authorized to impose upon all street railway companies occupying with their tracks parts of the beds of streets, avenues, or other highways in the City of Baltimore upon which work shall be done under this Act of the obligation to pay for said work so far as the same shall be done between the rails of their said tracks, and for a space of two feet on either side thereof, and the Mayor and City Council of Baltimore is further authorized to enforce said obligation by all such appropriate agencies, means, processes, proceedings and remedies as it may ordain for that purpose; but nothing in this Act shall be taken as in anywise relieving any such company or any other corporation or person from any obligation in its or his relations to the public highways of the City of Baltimore now cast upon it or him by law."

A suit was brought by the City under section 8, quoted above, of the Act of 1906, to recover the costs incurred by it for paving the track area of the defendant's road on Linden avenue between Dolphin street and North avenue, and a judgment was entered in favor of the City. Upon appeal, this Court reversed the judgment without awarding a new trial, holding: First, that the obligation to repair imposed by the Ordinance of 1859 did not include the obligation to *repave*; and, secondly, that the Act did not apply to those street railway companies upon which the obligation to repair only existed; *United Railways & Electric Company v. Mayor and City Council*, 121 Md. 552.

In the course of the opinion in that case, JUDGE CONSTABLE, speaking for the Court, said: "From the conclusion we have reached, we have not found it necessary to consider any of the questions raised other than whether the Acts of 1906, Chapter 401, and 1908, Chapter 202, and the titles thereto are comprehensive enough to carry with them a modification of the charter provisions of the appellant. And, therefore, we are not expressing any opinion as to whether or not it was in the power of the Legislature to impose the duty upon the appellant of repaving the track area in addition to that of repairing previously imposed."

That case was decided in October, 1913, and at the ensuing session of the General Assembly the Act of 1914, Chapter 37, approved March 10, 1914, upon which this suit was brought, was passed. The declaration alleged that subsequent to the passage of the Act of 1914, Chapter 37, "the Paving Commission of Baltimore City gave to the United Railways and Electric Company the notices required by said Act to be given prior to the beginning of the work hereinafter mentioned, and the said defendant declined to do any of the work within the railway area, and thereafter the said Paving Commission proceeded to repave with improved paving, Baltimore street, including the railway area from Fremont avenue to Liberty street, being upon a portion of the franchise originally granted to the Baltimore City Passenger Railway Company by the Act of 1862, and the Paving Commission incurred for paving in the railway area, on behalf of the Mayor and City Council of Baltimore, and the Mayor and City Council of Baltimore have paid an expense for the paving in the railway area, amounting to twenty-one thousand, four hundred and fifty-five dollars and forty-four cents (\$21,455.44), as per statement hereto attached, and said Paving Commission used in said railway area no more expensive material than was in their judgment reasonably necessary.

"That said work was completed on September 9, 1914, and said bill for said twenty-one thousand, four hundred and fif-

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ty-five dollars and forty-four cents (\$21,455.44) was duly presented to and demand for payment made of the defendant, and payment thereof was refused, and the plaintiff further says that the defendant has refused to pay any portion of the obligation imposed upon it by said Act of 1914, Chapter 37, wherefore there is due and payable by said defendant to the plaintiff the said sum of twenty-one thousand, four hundred and fifty-five dollars and forty-four cents (\$21,455.44), with interest thereon from September 9, 1914."

At the trial below it was agreed "that the plaintiff paved Baltimore street from Fremont avenue to Liberty street, including the space in the railway area, for which this suit is brought; that all of said work was done by the Paving Commission pursuant to the Act of 1914, Chapter 37; and that, in reference to said work, the Paving Commission complied with the requirements of said Act, and said paving consisted of asphalt and scoria block (between tracks) in place of the belgian block for the whole width of the street; and that no more expensive material or construction was used in the railway area than was, in the judgment of the Paving Commission, reasonably necessary for the proper construction of the paving of the entire street."

The Act of 1914, Chapter 37, will now be examined. It is entitled "An Act in pursuance of the power of taxation and of the police power, and the general power of the Legislature over public highways, and in the exercise of the reserved power to alter or repeal the charter of all corporations incorporated since the Constitution of 1850; imposing upon every corporation occupying with railroad or street railway tracks any portion of any public highway of Baltimore City, the obligation to pay the cost or expense of paving or repaving the portion of such highway lying within the track or tracks and for a distance of two feet outside of each outer rail of said track or tracks, whenever the said highway shall be paved or repaved with improved paving by the Paving Commission of Baltimore City, the State Roads Commission, the Annex Improvement Commission,

the City Engineer, or any other public commission, board or agency." Then follows some recitals which are not of controlling importance. Section 1 imposes "upon every corporation occupying with railroad or street railway track or tracks any portion of any public highway in Baltimore City which shall hereafter be paved or repaved with improved paving by the Paving Commission of Baltimore City, the State Roads Commission, the City Engineer, the Annex Improvement Commission, or any other public commission, board or agency, the obligation to pay for the cost of such paving within the space covered by any such railroad or railway track or tracks and for a distance of two feet outside of each outer rail of such track or tracks. The cost of the paving, as herein used, shall be construed to include the cost of the removal of the old cobble or other paving, and all excavation, ballasting, grading, concreting and other work involved in such paving. This obligation shall apply whether the entire street be paved with the same kind of improved paving or whether one kind be put outside of the railway area and a different kind within the railway area, provided no more expensive material or construction be used in the railway area than is reasonably necessary, in the judgment of the Paving Commission or other agency doing such paving, for the proper construction of the paving of the entire street. \* \* \* The obligation hereby imposed shall be a lien upon the property of such corporation to the same extent as ordinary taxes against the property of such corporation, and may be enforced and collected by the same remedies used for the enforcement and collection of taxes, and payment thereof may be enforced by the Mayor and City Council of Baltimore by a suit at law or by any other remedy provided by any law or ordinance, and appropriate for said purpose. All said remedies shall be cumulative. The city, through its Paving Commission or other commission, board or agency doing such paving, may pay the cost of the paving in the railway or railroad area in the first instance, and in that event the said cost when paid by the railway or railroad corporation shall

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be credited to the fund from which the cost of said paving shall have been paid in the first instance; and the amount of the cost shall be due and payable for the work done in the railway area in any street or portion of a street embraced in each separate contract or separate undertaking of construction by said Paving Commission or other agency, upon the completion of such work. Provided that no corporation shall be required to pay under or by virtue of the provisions of this Act more than \$100,000 during any one year. If the cost of the work for which any corporation is made liable under this Act shall exceed \$100,000 in any one year, the excess above \$100,000 shall not be due and payable until the following year; the intent of this proviso being that the entire obligation imposed by this Act shall be paid by every corporation upon which it is imposed, but that no corporation shall be called on to pay more than \$100,000 thereof in any one year."

It is clear, not only from the language of the Act, but from the other legislation relating to the subject, that it was passed for the purpose of imposing upon the defendant company and others similarly situated a portion of the burden incurred in the repaving of the city streets. The charge laid upon this defendant is limited to \$100,000 in any one year. The charge imposed is essentially a tax or a special assessment levied upon the property of the corporation for a local improvement, viz, the improvement of the streets of the City,—and it is imposed because the Company has property in the zone where the improvements are made. To call the thing imposed an obligation does not change its essential character and attributes as a tax or a special assessment. It is a *lien* upon the defendant's property "to the same extent as ordinary taxes." The burden imposed upon the defendant falls clearly within the definition of a special assessment as defined by text writers and adjudged cases.

In *Gould v. Baltimore*, 59 Md. 378, it was said: "The right to make such assessments is undoubtedly an exercise of the taxing power, but an assessment thus made differs from

a general tax levied for state and city purposes. The latter is a tax imposed on all persons within the territorial limits according to the value of their property, in consideration of the protection which the Government affords alike to all. A local assessment, on the other hand, is a tax levied occasionally as may be required upon a limited class of persons interested in local improvement, and who are presumed to be benefited by the improvement over and above the ordinary benefit which the community in general derive from the expenditure of the money. In the payment of the assessment thus made, the adjacent owner is supposed to be compensated by the enhanced value of his property arising from the improvement. And hence, it has been uniformly held that the word taxes, whether used in an Act of the Legislature, or the charter of a company exempting it from taxation, does not embrace such local assessments, unless there be something in the statute or charter to indicate such an intention."

The only principle upon which taxes of this kind can be supported is thus stated in section 236 of *Hamilton on the Law of Special Assessments*: "No benefit, no tax, is the rule, tersely expressed. An able text writer lays down the general rule that special taxation for a local improvement, as well as special assessments of benefits for the same, necessarily proceeds upon the theory of benefits to the property upon which it is levied, and that a burden imposed upon any other theory is a mere arbitrary exaction; a taking of private property for public use without just compensation. JUDGE DILLON says: 'Special benefits to the property assessed, that is, benefits received by it in addition to those received by the community at large, is the true and only just foundation upon which local assessments can rest; and to the extent of special benefits it is everywhere admitted that the Legislature may authorize local taxes or assessments to be made.' JUDGE COOLEY writes that 'there can be no justification for any proceeding which charges the land with an assessment greater than the benefits; it is a plain case of ap-

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propriating private property to public uses without compensation,' and that 'a clear case of abuse of legislative authority, in imposing the burdens of a public improvement on persons or property not specially benefited, would be undoubtedly treated as an excess of power and void.' "

This is the Maryland doctrine upon the subject; *Baltimore City v. Moore*, 6 Harris & Johnson, 375; *Baltimore City v. Howard*, 6 Harris & Johnson, 383; *Baltimore City v. Hughes*, 1 Gill & Johnson, 480; *Baltimore City v. Scharf*, 54 Md. 499.

JUDGE ALVEY, in his dissenting opinion in *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1, announced the doctrine which has always obtained in this State upon the subject of special assessments as follows: "The principles and rights of these special assessments are just in themselves when properly applied. It is only, however, when the property assessed receives from the improvement benefits in addition to those received by the community at large that the principle can properly apply. This, says JUDGE DILLON, as the result of all the authorities, is the true and only solid foundation upon which local assessments can rest. 2 *Mun. Corp.* sec. 761. And this is the precise ground upon which it is said by this Court that they can be supported and none other; *Alexander v. Baltimore*, 5 Gill, 383. The same principle is fully affirmed in *Burns v. Baltimore*, 48 Md. 203. The special benefit, therefore, is the essential condition of the assessment. Without it, there is no power to make the assessment; and any attempt to enforce an assessment where there is no special benefit conferred is a wrong, and, if consummated, is nothing more nor less than the confiscation of private property for public use, without compensation."

This case overruled the case of *Baltimore v. Scharf*, 54 Md. 499, but the principle stated by JUDGE ALVEY is in harmony with the decisions in both cases upon this subject. The *Hopkins Hospital* case was followed in *Moale v. Baltimore*, 61 Md. 224, and in *Alberger v. Baltimore*, 64 Md. 1; but was overruled upon the constitutional question involved in

*Ulman v. Baltimore*, 72 Md. 587, in which the Court said: "We must return to the doctrine laid down in *Scharf's case*, 54 Md. 499," and referred to the dissenting opinion of JUDGE ALVEY in support of its conclusion.

It results from the principle stated that there can be no recovery in this case unless the defendant is specially benefited by the improvement, because the assessment laid upon it was illegal and void.

That the defendant was not specially benefited was distinctly decided in *Scharf's Case*. In that case it was contended that The Baltimore City Passenger Railway Company—the predecessor of the defendant—should be charged for a part of the cost of paving a portion of Baltimore street between Harrison and Greene streets. Its liability was urged upon two grounds: First, its repair obligation under the Ordinance of 1859; and, secondly, its liability to a special assessment for doing the work. It was contended "that the roadbed, etc., of a street railway company is liable to such assessments for local improvements." In disposing of these contentions, the Court said: "The questions raised by the appellees that the City could not order this repaving to be done at the charge of the appellees because the charter of the City Passenger Railway Company imposed the duty on that corporation of keeping the track of the road and for two feet on each side of it in thorough repair; or if it could, it could not do so legally without assessing it with a part of the costs,—are not necessary to the decision of the case as it stands; but as it may prevent further litigation on that score we may properly dispose of the questions. There can be no doubt that the rails, roadbed and other property of that corporation are subject to taxation for municipal purposes; but it does not follow that it must contribute specially to street improvement such as this is. Their estate is such as would not be enhanced in value by the projected work. The only ground on which assessments, on the owners of land on each side of the road for such improvements, has ever been justified, is on the theory that such property owners are specially

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benefited and the land itself enhanced in value by the improvements." It is to be remembered that this was said at a time when the amending power reserved by the constitution of 1867 was in full effect. The conclusion reached on this point appears to be based upon experience and sound sense. How can it possibly be held or successfully contended that a railway company can be specially benefited over and above the other inhabitants or travelers on the streets by improved pavements? If an assessment upon a street railway can be sustained upon the ground of special benefits to the company resulting from new and improved pavements, such an assessment may be sustained against the owners of automobiles and other conveyances using the streets; the burden laid upon the defendant was done in the attempted exercise of the taxing power for a public work which conferred no special benefit upon the defendant, and cannot be sustained under the law of this State.

"In the absence of any such benefit," said the Court in *City of Alleghany v. Western Penn. R. R. Co.*, 138 Pa. St. 375, "in a case where we can declare as a matter of law no such benefit can arise, the Legislature is powerless to impose such a burden. It would not be a 'tax' in any proper sense of the term; it would be in the nature of a forced loan, and would practically amount to confiscation." The imposition of this burden cannot be sustained under the reserved power to amend. That power is not unlimited, and was never intended to confer upon the General Assembly the power to deprive the citizen of his property contrary to the law of the land, or to take private property for public use without just compensation. It must be given a construction which will harmonize and preserve the general constitutional restraints upon legislation in regard to private property. Many things have been done under this power, as appears by the cases cited in the briefs, but we are not called upon in this case to fix the limits of this power. It is better to confine ourselves to the precise question before the Court.

What we decide is that the charge imposed upon the defendant, and for which this suit is brought, is illegal, and cannot be sustained under the amending power or under any other power known to the law of this State. Where the law of a particular jurisdiction holds the estate of a railway company in the bed of a street subject to an assessment, or where the company has assented in fact, or by legal construction to such a burden, no doubt it can be imposed. The *New Haven Case* cited above is one in which both of these necessary conditions existed and the obligation to pay was properly imposed.

The defendant is not claiming an exemption from taxation. It was under no obligation under its charter or otherwise to pay any part of the costs for paving the portion of the street mentioned in the declaration. All of its property is taxed, and it contributes in general taxes to the costs of public improvements and the general welfare of the city, large sums of money. It is resisting what it contends to be an unlawful and illegal exaction laid upon it by the Act of 1914, Chapter 37.

It follows from what we have said, that the Legislature had no power under the Constitution and laws of this State to charge the defendant with the cost of doing the work sued for in this case, and shown by the account filed with the declaration. The judgment must, therefore, be reversed, without awarding a new trial.

*Judgment reversed without awarding a new trial, the costs to be paid by the appellee.*

Md.]

Syllabus.

STATE OF MARYLAND, FOR THE USE OF MOLLIE L.  
TILGHMAN, WIDOW, AND MARGARET E. TILGHMAN  
AND JOHN W. TILGHMAN, CHILDREN OF  
WILLIAM L. TILGHMAN,

vs.

THE NEW YORK, PHILADELPHIA AND NORFOLK  
RAILROAD COMPANY.

*Railway engineers: persons approaching track; contributory negligence; crossing tracks without looking. Evidence: erroneous ruling; when no cause for reversal.*

A party in full possession of his faculties, who, for a distance of even 40 feet, has an unobstructed view of an approaching railroad engine, before he reached the place on the tracks where he was struck by the engine, and who if he had paused and looked before attempting to cross the tracks, would have avoided the accident, is guilty of contributory negligence as a matter of law. p. 677

When the engineer of a railroad engine sees a person approaching a railroad crossing, he has the right to assume that he will stop in a place of safety, and not attempt to cross in front of the approaching engine. p. 679

In such a case where there is no evidence that the engineer neglected any precautions to avoid the accident, after he discovered the dangerous position of such party, a prayer taking the case from the jury is properly granted. p. 680

The ruling of a Court sustaining an objection to evidence, can not be reversible error, when the same is elsewhere admitted in the case with objection. p. 680

*Decided February 9th, 1916.*

Appeal from the Circuit Court for Dorchester County.  
(STANFORD, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*Thomas H. Lewis* and *Alonzo L. Miles*, for the appellants.

*George H. Meyers* (with whom was *Joshua W. Miles* on the brief), for the appellee.

BRISCOE, J., delivered the opinion of the Court.

The controlling facts of this case, are the same as those just decided on the 9th day of February, 1916, of *State Use of Cullen, v. The New York, Philadelphia and Norfolk Railroad Company*, same appellee as in this case. (*Ante*, page 651.)

In Cullen's case, the deceased came to his death while attempting to cross on a bicycle, one of the streets of the town of Crisfield, Somerset County, and was struck and killed by one of the moving trains of the appellee.

In this case, the husband and father of the equitable plaintiffs, was killed on the morning of the 4th of June, 1913, while attempting to cross the track of the appellee on a bicycle, at a public crossing, at Railroad Avenue and Anne Street, in the town of Salisbury, Wicomico County, Maryland.

The appellee corporation owns and operates a railroad running between the City of Norfolk, in the State of Virginia, and Delmar, Maryland, by and through the town of Salisbury, Maryland.

The place at which the accident occurred, is known as Anne Street crossing and is a public and much used crossing over the defendant's tracks in the town of Salisbury. The

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## Opinion of the Court.

locomotive which struck the deceased was running backward pushing its tender on the north-bound track of the appellee, without any cars attached and was approaching the crossing, from the south, at the rate of about five or six miles an hour.

The undisputed evidence shows that the deceased had an unobstructed view of the approaching engine for a distance of forty or fifty feet from the place where he turned into Anne Street, before he reached the point where he was struck, and if he had stopped and looked before attempting to cross the track, he could have seen or heard the approach of the car, in time to have avoided the accident. He was familiar with the crossing and the surroundings, the bell of the locomotive was ringing and the view unobstructed for a distance of forty or fifty feet before he reached the crossing.

The principles of law controlling a case of this character are too well settled to admit of controversy.

In *State, Use of Dyrenfurth*, v. *B. & O. R. R.*, 73 Md. 374, it was held that, an adult in full possession of his faculties, without stopping to look, who voluntarily attempted to cross a railroad track in full view of a moving engine, which was running backward and was struck by the tender of the engine and killed, was guilty of contributory negligence, as a matter of law. *United Rys. and Electric Co. v. Durham*, 117 Md. 192, and cases there cited; *Westerman v. United Rys. and Electric Co.*, 127 Md. 225; *State, Use of Cullen*, v. *N. Y., P. & N. R. R.*, ante, page 651.

In *Cullen's* case, *supra*, we held, under a similar state of facts, that *Cullen* was guilty of contributory negligence, and said, he was riding upon a bicycle, and at the point where he reached the track, he could easily have stopped and dismounted and there looked and listened for an approaching train, but this he failed to do, and met his death as described by the testimony. *Robertson v. Pa. R. R. Co.*, 180 Pa. 43; *Passman v. West. J. & S. Shore R. R. Co.*, 68 N. J. L. 719

In *Sparr v. United Rys. Co.*, 114 Md. 320, it is said: It is apparent that if he had looked before entering upon the

track of the railway he would have seen the car approaching, and if he did look and did see the car, he was guilty of negligence in attempting to cross in front of it. If on the other hand he did not see the car, it must have been because he did not look, and it was negligence on his part to venture to cross the track without observing the precaution of looking to see if a car was coming. Even if those in charge of the car saw the appellant before he got on the track they had a right to assume that he would stop in a place of safety and not attempt to cross in front of the car.

It is, however, urged upon the part of the plaintiff, that the liability of the defendant, in this case, consists in its failure to use all reasonable care and effort, after the engineer discovered the danger of Tilghman, to avoid and prevent the accident, notwithstanding the negligence and carelessness of the deceased, in placing himself in the position that he did.

In *State v. B. & O. R. R. Co.*, 69 Md. 339, it is said, "The law is too well established to need the citation of authorities to show that although a person may unlawfully and recklessly be upon a railroad, and by his own voluntary action be placed in a position of peril, still it is the imperative duty of the engineer, or the person in charge, as soon as the dangerous position is discovered, to use all reasonable efforts to prevent an accident. The complete exoneration of the defendant then depends upon these two propositions, first, that the deceased was guilty of contributory negligence in being upon the track, and, secondly, that as soon as her danger was discovered every reasonable effort was made to avert it."

In *W. Md. R. R. Co. v. Kehoe*, 83 Md. 452, this Court said in order to sustain this theory of the defendant's negligence, it was essential for the plaintiff to show, first, that the company's servants had knowledge of the peril; secondly, that they had that knowledge in time to avert an injury, and, thirdly, that they failed to exert proper care to avoid the injury after acquiring knowledge of the peril. *Phila. & Balto. R. Co. v. Holden*, 93 Md. 422; *State, Use of Silver*,

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v. P., B. & W. R. R. Co., 120 Md. 71; *McNab v. United Rys.*, 94 Md. 720.

In the present case there is no evidence to show that the engineer did not do all that was required of him to avoid the accident, when he discovered the perilous position of the deceased.

On the contrary, he testified that when he first saw the deceased he had turned into Anne Street, about forty or fifty feet from the crossing, that he was looking over the handle bars of the bicycle, ahead of his wheel, and going in a diagonal direction, and when he was within fifteen or seventeen feet of him, and when he found he was going to try to cross, he hollered "Look out there; grabbed his emergency brakes and put them on, the only thing he could do to stop the engine. That the condition of the track was wet from the rain that morning and the wheels skid on the rails." He further testified that he put on the brakes as soon as he saw the deceased was in a place of danger, and that he had ample time to stop the wheel and get off when he hollered and called his attention to the position he was in, that he did not see him when he was struck because he was on the opposite side, and the engine skidded about 60 or 80 feet.

The witness Bennett, who was near the crossing and saw the deceased go under the engine, testified that he heard a crash at the time the engineer put on the brakes. "The engineer had put on his brakes. Engine was slipping. It was sliding right down on him, the crash was the brakes he put on."

It is clear, we think, that when the engineer saw the deceased approach the crossing, he had a right to assume as he stated that he would stop at a place of safety and not attempt to cross in front of the engine. *Md. Central R. R. Co. v. Neubeur*, 62 Md. 401; *Sparr v. United Rys. Co.*, 114 Md. 320.

And it is further evident from the undisputed evidence, upon the part of the plaintiff, that when the engineer dis-

covered the peril of the deceased, he did all that the law required of him to do to avoid the injury and to prevent the accident which caused the death of Tilghman, the husband and father of the equitable plaintiffs.

There was no evidence that the defendant's servants, in this case, failed to exert proper care to avoid the injury after the discovery of the perilous position of the deceased, and as was said by this Court, in *State, Use of Silver, v. P., B. & W. R. R. Co.*, *supra*, a verdict finding that they did not would necessarily have been founded on mere speculation and conjecture.

For the reasons stated, we think the lower Court was entirely right in granting the defendant's prayers, instructing the jury that the deceased was guilty of contributory negligence and that under the pleadings and evidence, there was no legally sufficient evidence to entitle the plaintiff to recover and their verdict must be for the defendant.

We find no error in the rulings of the Court upon the admissibility of evidence set out in the five bills of exceptions.

No injury was done the plaintiff by the refusal of the Court to permit an answer to the question objected to in the first exception, because the testimony was admitted without objection, in the subsequent trial of the case. *Michael v. Smith*, 124 Md. 121; *Rice v. Dinsmore*, 124 Md. 282.

The second, third, fourth and fifth exceptions were to the refusal of the Court to permit an engineer to testify as to the space within which an engine such as ran over the deceased, going backward could be stopped. This testimony was immaterial, in view of the previous testimony upon the subject and its rejection could not have injured the plaintiff's case. *State v. P., B. & W. R. R.*, 120 Md. 71.

Finding no error in the rulings of the Court, the judgment will be affirmed.

*Judgment affirmed, with costs.*

Md.]

Syllabus.

CONSOLIDATED GAS ELECTRIC LIGHT AND  
POWER COMPANY OF BALTIMORE, A  
BODY CORPORATE,

vs.

THE MAYOR AND CITY COUNCIL OF BALTI-  
MORE, A MUNICIPAL CORPORATION.

*Change of location of electric cables by order of city: cost.*

Under the terms of the lease between the City of Baltimore and the Consolidated Gas Electric Light and Power Company for the use of the City's cable conduits, where a change of location of the cables is ordered by the City, from one duct to another, without the assent of the Electric Company, one-half of the expense is to be borne by that Company and one-half by the City: *Held*, that, under the true construction of the contract, that the one-half expense referred to includes the new or additional cable wire which was necessary to such shifting.

p. 688

*Decided February 9th, 1916.*

Appeal from the Baltimore City Court. (GORTER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*E. M. Sturtevant* and *Raymond S. Williams*, for the the appellant.

*Benjamin H. McKindless*, Assistant City Solicitor, (with whom was *S. S. Field*, City Solicitor, on the brief), for the appellee.

PATTISON, J., delivered the opinion of the Court.

On the 26th day of October, 1903, the Electrical Commission for the City of Baltimore leased unto the Electric Light and Power Company, the predecessors of the appellant company, duct space for its cables and wires in the conduit system constructed in the streets of the City by the Electrical Commission.

Upon the execution of the lease the lessee placed its cables and wires in the ducts so rented by it, and used the same in supplying light and power to its patrons or customers throughout the City. Since the execution of the lease some of the cables and wires of the lessee have at different times been shifted from the positions or ducts in which they were originally placed to other ducts upon the order of the lessor, but the frequency with which this has been done is not disclosed by the Record. In this case, however, we are only concerned with the shiftings that were made under the orders of August 15th, 1912, and February 3rd, 1913. These orders were signed by George W. Wennagel, a representative of the lessor, and approved by Raleigh C. Thomas, Chief Engineer of the Electrical Commission.

On July 30th, 1912, W. P. Beyerle, a representative of the lessee wrote Mr. Thomas saying:

"Will you please issue this company an order to rearrange our cables, at the expense of the Electrical Commission, in manholes as listed below, on account of the alterations which have been recently made?"

In the list mentioned is the manhole at Baltimore and Sharp Streets.

In reply to this letter Mr. Thomas wrote Mr. Beyerle, saying:

"As regards the recently reconstructed manholes located Baltimore and Sharp Streets, \* \* \* you are hereby requested and authorized to proceed with the work of rearranging your cables contained therein to conform to the altered conditions. Under the terms

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of your lease one-half of the expense connected with these changes will be paid by the City."

On August 15th, 1912, an order of that date was forwarded to the appellant, and is as follows:

"Please rearrange your cable layout in the manhole located at Baltimore and Sharp street, to conform to the altered conditions, as per our letter of August 2nd, 1912."

On February 3rd, 1913, Mr. Thomas again wrote to Mr. Beyerle, saying:

"In order to permit of the construction of the recreation pier at the foot of Broadway, I am sending you an order authorizing you, subject to the terms of your lease and to the supervision of this department, to transfer your equipment from the conduits which must be immediately abandoned on the south side of Thames Street between the junction boxes located at the southwest and the northeast corners of Broadway to the new conduits just completed which connect the same two holes via the north side of Thames Street."

With this letter was enclosed the order of February 3rd, 1913, which is as follows:

"Please transfer your equipment from the conduits on the south side of Thames Street, between the southwest and the northeast corners of Broadway to the new conduits on the north side of Thames Street, between the same points, to permit of the construction of the recreation pier at the foot of Broadway."

After receiving the above orders the appellant proceeded to comply with them, and when the work was completed, the appellant, in accordance with the lease, as they constructed it, sent to the appellee for payment a bill for one-half of the amount expended for labor and material used in making the changes and shiftings at each of the above named places. The

bills as presented to the appellee contained items of charges for cable, wire, copper and lead sleeves, solder, gasoline, waste, candles, paste, tape, cement, rope, etc.

The appellee on March 26th, 1914, wrote to the appellant company and in speaking of the bill of expenses for the shifting of the cable at Baltimore and Sharp Streets said: "This charge is correct, except for the items for cable used. When these are eliminated and a properly revised bill rendered, we will pass same for payment," and in respect to the bill of expenses for the Thames and Broadway Street shifting said: "The charge for cable installed and credit for old cable recovered should be eliminated. When this is done the bill will be put through for prompt payment."

The appellant, declined to eliminate these disputed items from the bills and the appellee refused to pay the same, because, as stated by the only witness who attempted to give a reason therefor, the cable and wire were "an asset of the Consolidated Gas Company, and a part of their physical valuation." The appellee offered to pay the bills with said items eliminated, and when suit was instituted by the appellant, the appellee paid into Court the amount of said bills less the disputed items and at the trial of the case below, the Court, sitting as a jury, rendered a verdict in favor of the plaintiff for the sum of \$80.63, the amount of said bills less the disputed charges, and upon this verdict a judgment was entered. It is from that judgment that this appeal was taken.

The sole question before us on this appeal, is whether or not, under the lease, the appellee was to pay for any part of the additional cable and wire used in the changes and shifts made upon the orders of the appellee, at the places mentioned. The provisions of the lease upon which the determination of this question depends is as follows: "That if at any time or times hereafter the lessor shall, without the assent of the lessee, require the lessee to shift its cables and wires or any part or parts thereof from one set of ducts to another, in said municipal conduit works, one-half of the expense

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thereof shall be borne and paid by the Mayor and City Council of Baltimore."

The bills rendered to the appellee for the work and material used at Baltimore and Sharp Streets amounted to \$119.66, one-half of which was \$59.83. To this amount was added \$5.98, or one-half of ten per cent for supervision, office expense and use of tools, making a total of \$65.81, the amount claimed by the appellant to be due and owing by the City under the lease.

The disputed items in this bill consisted of 7 feet of cable valued at \$8.66, 22 pounds of wire valued at \$3.72, 26 feet and 2 inches of No. 8 arc cable valued at \$7.46, 4 feet of cable valued at \$1.36, making a total of \$21.20. This amount deducted from the total amount of the bill left \$98.46. One-half of this amount (\$49.23), together with the sum of \$4.92, or one-half of ten per cent for supervision, office expense, etc., amounted to \$54.15, which the appellee conceded to be owing by it. The difference in the amounts claimed to be owing was \$11.66.

The items of debit and credit that were asked to be eliminated from the bill rendered the appellee for work and material used in the Thames and Broadway Street transaction are as follows:

*Value of Material Used.*

## Value of Cable Installed:

97' 3" 500,000 S. C. P. & L.—240V.....	\$43.77
44' 6" #8 Arc Cable.....	11.79
46 lbs. 350,000 S. C. M. Wire.....	6.90
	<hr/>
	\$62.46

## Value of Good Cable Recovered:

61' 6" 500,000 S. C. P. & L.—240V.....	\$27.68
18 lbs. 350,000 S. C. S. M. Wire.....	2.70
20' Arc Cable.....	5.30
Value Junk Cable returned.....	2.76
	<hr/>
	\$38.44

The balance of the bill amounted to \$48.15, one-half of which, \$24.08, together with \$2.40, the City's part of the expenses for supervision, etc., amounted to \$26.48. The amount that the appellant claimed that the City was owing on this work was \$39.07. The difference in the amount said by the parties to be owing was \$13.22.

In this connection, however, it is stated in the appellant's brief that "upon the determination of this case rests the settlement of a large number of bills."

The shifting of the cable and wires at Baltimore and Sharp Streets became necessary because of the enlargement of the manhole by the City. The enlargement was made by extending both its south and east walls.

While this work was being done the cables were hung upon supports temporarily constructed in the manhole, and when the new walls were completed the cable and wires were out, spliced, and placed upon hangers attached to the new walls. As the hole was enlarged and the circumstances increased, more cable and wire was required because of the enlargement.

Additional cable and wire was also made necessary because of the loss in cutting and splicing the cable, as was explained by one of the witnesses who stated that "you always lose a certain amount of cable in cutting it, for instance, in making a splice you have to cut back your lead a certain distance and when you cover that cable you must cut the lead off so that you can seal it up." The Record discloses that the shifting of the cable and wires in the manhole in no wise benefited the appellant company, "as it worked just as good before, as after the new cable was put in," and resulted in no additional profit to the company.

The shifting of the cable at Thames and Broadway Streets was made necessary by reason of the building of the City Recreation Pier, as shown by the letter of Mr. Thomas to the appellant of February 3rd, 1913, in which he says: "In order to permit of the construction of the Recreation Pier at the foot of Broadway, I am sending you an order \* \* \* to

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transfer your equipment from the conduits which must be immediately abandoned on the south side of Thomas Street between the junction boxes located at the southwest and the northeast corners of Broadway to the *new conduits just completed*, which connect the *same two holes* via the north side of Thames Street."

The appellant was required by the order of the City to remove its cable and wires from the conduits in which they were then located, to the new conduits which had been recently completed by the City, and to avoid cutting off the service, it allowed the cable and wires to remain as they were in the old conduits until they had placed the cables and wires in the new ones, and then removed the cable and wires from the old ones. It is not shown by the Record that the appellant was at all benefited by the shifting of said cable and wires, although the cables and wires may have been lengthened. The City was charged for one-half of the cable and wire that was placed in the new conduits, and was allowed a credit, at the same price per foot or pound, for one-half of the cable and wire that was removed from the old conduits. The quantity of cable and wire placed in the new being greater than the cable and wire in the old, the City was called upon to pay one-half of the cost of such excess, which it refused to pay.

In the two above-mentioned cases the shifting of the cable and wires were not made with the assent of the appellant company, and under the lease "one-half of the expense thereof" was to be borne by the Mayor and City Council of Baltimore. Therefore, we are to determine what is to be included within the term "*expense*." The City contends that the cost of the additional cable and wires is not to be included within this term, because the cable and wires are an asset of the company and a part of its physical valuation, although its liability for the payment of all other material, including solder, sleeves, etc., as well as the labor used in connection with the installation of the same is conceded by it.

This is not, we think, the proper test to be applied in determining the question as to what was intended by the parties to the lease, to be included within the term "*expense*."

It was contemplated by them, at the time of the execution of the lease, that it would be necessary to change or shift the cable and wires of the company from time to time to conform to the changes and conditions in the Municipal conduit system, and that in making such shiftings or changes the company would not at all times be benefited thereby, and when not so benefited it would not be willing to make such shiftings at its own expense. It was, we think, because of this fact, that the lease provides that the expense shall be borne equally by the City and the company, and we think, in such cases, the expenses includes the cost of the additional cable and wire if any are used in making such shiftings.

The Court below granted the prayers of the appellee which were based upon this contention as we have stated it, and rejected the prayer of the appellant. The Court erred, we think, in so ruling, and because of which we will reverse the judgment of the Court below.

*Judgment reversed and new trial awarded,  
with costs to the appellant.*

Md.]

Syllabus.

IDA B. ROSMAN

vs.

THE TRAVELERS' INSURANCE COMPANY OF  
HARTFORD, CONNECTICUT, A

BODY CORPORATE.

*Life insurance: suicide clause; interest of beneficiary; confession by insured; motive for suicide; evidence of money losses and involved accounts.*

In the case of ordinary life insurance, the beneficiary has a vested interest from the time the contract is entered into, unless the policy provides for a change of beneficiary by the insured.

p. 693

But where the rights of the beneficiary depend upon the will of the assured, the beneficiary can acquire no vested right under the policy before the death of the assured (unless the policy, while in the beneficiary's favor, matures otherwise).

p. 693

Where the beneficiary has no vested interest, declarations of the insured made against his interest are admissible in evidence in a suit on the policy.

p. 693

An insurance policy contained a clause excepting the company from liability in case of the death of the insured by suicide; it also contained the provision that the consent of the beneficiary was not necessary for any assignment of the policy or change of beneficiary; the insured died as the result of poison that he confessed he had administered to himself, with suicidal intent: *Held*, that his confession was admissible in evidence in a suit upon the policy brought by the beneficiary.

p. 694

In such cases evidence of financial difficulty and irregularity in the affairs of the decedent are admissible, as bearing upon the question of motive.

pp. 694-695

*Decided February 10th, 1916.*

Appeal from the Superior Court of Baltimore City.  
(DUFFY, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*David Ash* (with whom was *Louis Hollander*, on the brief), for the appellant.

*Wm. L. Marbury* (with whom was *James Thomas* on the brief), for the appellee.

CONSTABLE, J., delivered the opinion of the Court.

The appellant was the beneficiary named in a policy of accident insurance issued by the appellee to Samuel Rosman, her husband. In the suit by her to recover the amount for which Rosman was insured, in case of death, the jury found a verdict in favor of the appellee, and from the judgment entered this appeal was taken.

The record contains eighty-four exceptions to the rulings of the lower Court, and although each has been considered by us, it is not practical to discuss them separately and in detail, but they will be dealt with in the classes in which they naturally arrange themselves, and each class will be considered as a whole in discussing the principles of law applicable thereto.

Samuel Rosman was an agent of the appellee company for soliciting insurance, and on January 2nd, 1913, had himself insured against accident for the total amount of five thousand dollars, and named as the beneficiary in case of death his wife, the appellant. Provisions were made, in addition to that for loss by death, for both total and partial disability of the insured, the sums payable therefor to be paid to the insured, and also for reimbursement for any hospital charges incurred because of any injuries for which indemnity, under the policy was payable. The policy expressly excepted, how-

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ever, from its operation, death caused by suicide, sane or insane. There was also a proviso that "the consent of the beneficiary shall not be requisite to a surrender or assignment of this policy or to a change of beneficiary."

Samuel Rosman became ill on May 16th, 1913, and died June 5th following, at a hospital where he had been taken for treatment. It appears from the testimony that a physician was called in to see the sick man on May 17th and was told by Rosman that he had eaten, the previous evening, salmon and sausages. Rosman continued to grow worse and another physician was called into consultation; and upon his repeated denials that he had eaten or taken anything but salmon and sausages, the physicians treated him for ptomaine poisoning, and removed him to the Hebrew Hospital. While there, late at night, on May 28th, Rosman sent for one of his physicians and said to him: "Doctor, the night before I was taken sick, I took three tablets of bichloride of mercury, seven and one-half grains each. It didn't kill me yet, and, Doctor, if you can help me with anything go ahead and do it." Shortly afterwards he substantially repeated the above to his other physician. On June 4th Rosman was visited by an adjuster for the appellee company, three members of a lodge to which he belonged, and his brother. Rosman said to them: "Well, before I die I want to tell you something what I have done," and then dictated the following statement which was taken down separately by the adjuster and one of the lodge members, and after having been read to Rosman, was signed by him. Both papers were substantially the same, and both were admitted in evidence. They are as follows:

"BALTIMORE, Md., June 4th, 1913.

Statement of Samuel Rosman made this day in the Hebrew Hospital:

May 16th, on Friday, I took 3 bichloride,  $3\frac{3}{7}$  grains, put them under my tongue, took water and washed them down. My reason for taking the tablets was because I had been playing the races and I was \$700.00 in the hole. I bought the tablets which I took with

suicidal intent on Thursday night, May 15th, at drug store S. W. corner of Baltimore and Spring Sts.

S. ROSMAN.

Witnesses: Abm. Linder, Michael Freed, Michael Rosman, Louis Fischel, John P. Calhoun."

There was also testimony offered and admitted that the appellee was the holder of six promissory notes delivered by Rosman to the company, purporting to have been given by policy-holders for premiums due on policies sold by Rosman. The holders of the policies each testified that the notes purporting to bear their signatures had not been signed by them, but that they had paid the premiums in cash to Rosman. Rosman had also been paid by the company his commission out of the notes. One of these notes became due six days after he became ill.

A large number of the exceptions relate to the admissibility of the admissions and declarations made by Rosman as set forth in the above brief synopsis of the testimony. The theory of the appellant being that in this suit by the beneficiary, they were not admissible, against her, since they were not of the *res gestae*. But for a settlement of this we are not concerned with whether or not they were of the *res gestae*. By the terms of the policy the insured reserved to himself the right to change the beneficiary without the consent of the beneficiary. By the overwhelming weight of authority it is held that where the rights of the beneficiary are dependent upon the will of the assured, the beneficiary acquires no vested right until the death of the insured. And this is assuredly founded upon reason; for by the contract between the insured and the insurer, any right of the beneficiary before death is a mere expectancy depending upon the will and acts of the insured. Formerly the decisions drew a distinction between the policies of an ordinary life insurance and mutual or fraternal companies or organizations; declaring that in an ordinary life policy the beneficiary immediately acquired a vested interest at the issuance of the policy,

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but that in the others he did not. An examination of the cases discloses that the reason for the distinction was based upon the lack of the right of the insured to change the beneficiary, while in the mutual and fraternal companies the policies or the charters and by-laws, which constitute a part of the contract, reserved the right to the insured to make the change. However, in this day there are very few companies of any kind which do not contain stipulations that the beneficiary can be changed at the will of the assured.

In 25 *Cyc.* 889, under Rights of Beneficiary, it is said: "The beneficiary designated in an ordinary life insurance policy has a vested interest from the time the contract of insurance is made, *in the absence of any stipulation for change of beneficiary by the insured.*" And to the same effect is 3 *Amer. and Eng. Ency. of Law* (2nd Ed.), 980, quoted with approval by CHIEF JUDGE BOYD in delivering the opinion in *Preston v. Conn. Mut. Ins. Co.*, 95 Md. 101. And the same distinction is recognized in *Elliott on Insurance*, sec. 355. A perusal of the many cases cited in the notes to the foregoing will demonstrate the correctness of the text.

If then the appellant in the present case had acquired no vested interest in the policy we think it is equally clear that any admission made by the assured against his interest while he had an interest in the policy could be used against her in a suit against the insurer. If this were a suit by Rosman to recover the amount covered by the total or partial disability clauses or for reimbursement for hospital charges, there could be no sound argument urged against the admissibility of his declarations. Why then should they not be used against one who at the time they were made had only a mere expectancy?

The great weight of authority is to the effect that where the insured reserves control over the policy, so that the beneficiary has no vested interest in it, that then declarations made by the insured are admissible if declarations against his interest. In *Ency. of Evidence*, Vol. 7, p. 535, it is said: "Declarations of the persons insured, made either before or

after the issuance of a life policy, and not of the *res gestae*, should not be received in evidence, ordinarily, against the beneficiary, to avoid the policy. The same rule applies to forfeitures. *However, where the insured has the right to change the beneficiary at will his admissions are competent evidence against the beneficiary.*" We are of the opinion that not only the signed statements, but the verbal statements, in which he declared he had taken bichloride, were all admissible. Some point was made by the appellant that the statements made to the physicians were not admissible, because he did not then declare he had taken them with suicidal intent, and that, therefore, there was no admission against his interest. We think there is no force in this contention, for it was a fact to be considered by the jury in connection with the dilatoriness of his disclosing what he had taken after his repeated denials that he had taken anything. *Steinhausen v. Pref. Mutual Acc. Assn.*, 59 Hun. 336; *Life Association v. Winn*, 96 Tenn. 224; *Knights of Maccabees v. Shields*, 156 Ky. 270; *Brown v. Mystic Workers of the World*, 151 Ill. App. 517; *Lundholm v. Mystic Workers of the World*, 164 Ill. App. 472; *Whiteford v. North State Life Ins. Co.*, 163 N. C. 223; *Collins v. Modern Woodmen*, 98 Mo. App. 521.

A great many of the exceptions were to the admission of the testimony as to notes which were presented to the company by Rosman purporting to be for premiums on policies issued. We think there was no error committed in admitting any of this testimony. For every suicide, if by a sane person, there must be a motive. To prove the motive is often the most difficult of things. It is too well recognized that money matters are probably the predominating causes of suicide. In the present case practically the only question for the jury, after the admissions, to decide, was the question of suicide *vel non*. It surely, irrespective of the admission by Rosman, that he had taken poison with suicidal intent, would be most material to show, as bearing on the question, that his employer was in possession of paper given by him which never

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had been executed by the parties whose names were signed thereto. And when taken in connection with his confession, that he was seven hundred dollars in the hole from gambling, it certainly becomes very strong as establishing a motive for destroying himself before the paper became due. Of course, it is possible that, although the notes were signed in the names of persons to whom policies had been issued and cash premiums collected, there may have been other people of the same names who actually did sign them, but that is a contention that more properly goes to the weight of the testimony rather than to the admissibility.

The appellant as a witness testified that her husband had told her he had taken some aspirin tablets. In an effort to show that he had made a mistake and had taken bichloride under the impression that he was taking aspirin, she attempted to detail a conversation she had with him several days after the occurrence, and on objection the Court would not permit the conversation to be given. This ruling was correct, for it was not a part of the *res gestae*, nor was it a declaration against interest. It was more in the nature of a self-serving declaration, and therefore was not admissible.

The questions asked concerning conversations had with Michael Rosman were properly excluded, he being neither a party nor having been produced as a witness so that he could be impeached.

The first prayer of the appellant was properly refused, for there was ample evidence from which the jury could find that Rosman came to his death through suicide. The instruction asked for in the third prayer was plainly given by the granting of the appellant's second. The fifth prayer was properly refused as it was misleading and confusing, in the extreme. The two prayers granted at the instance of the appellee properly and fairly presented the law of the case.

Finding no reversible error, we will affirm the judgment.

*Judgment affirmed, with costs to the appellee.*



## MEMORANDUM.

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CASES DESIGNATED BY THE COURT NOT TO BE REPORTED.

MARY E. EARLE

*vs.*

THOMAS J. KEATING, TRUSTEE.

The presumption of law is in favor of the correctness of decrees of a lower court, until it is shown by the record in the Court of Appeals to be erroneous.

*Decided February 17th, 1916.*

Appeal from the Circuit Court for Queen Anne's County.  
(In Equity.) (CONSTABLE, C. J., and ATKINS, J.)

*Affirmed.* Opinion by PATTISON, J.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

*J. M. Mullen*, for the appellant.

*J. Frank Harper*, for the appellee.

JOHN FAIT AND THE WILLIAM J. BURNS  
DETECTIVE AGENCY

vs.

JAMES P. BANNON.

*Malicious prosecution: what must be proved; malice; want of probable cause; advice of counsel. Prayers: abstractions of law; exceptions to—; specific exceptions.*

In order to maintain an action of malicious prosecution, the plaintiff must prove affirmatively that he has been prosecuted, or that a prosecution has been instituted by the defendant or one of them; that such prosecution has terminated in his acquittal or exoneration from such charge, and that the prosecution was malicious and without probable cause.

Malice in such cases may be presumed upon the establishment of the want of probable cause; and the burden of proof is then upon the defendant to show such facts as will warrant a jury in finding that he was not actuated by malice.

“Malice” in such actions is not to be considered as spite or hatred against the individual, but that the party is actuated by improper or indirect motives.

The want of probable cause is a mixed question of law and fact.

What will amount to want of probable cause is a question of law for the court; and the existence of the facts relied upon as evidence of such want of probable cause in any particular case, is a question for the jury.

Prayers that are mere abstractions of law are improper, although the principles they announce may be correct.

In order to present for the review of the Court of Appeals, the action of the trial court on a prayer that was objected to because unsustained by any evidence, a special exception must be noted.

For the advice of counsel to serve as a defense to an action of malicious prosecution, it must appear that all the material facts in the possession of the defendant were fully and fairly made known to the counsel.

*Decided February 29th, 1916.*

Appeal from the Superior Court of Baltimore City.  
(DUFFY, J.)

*Affirmed.* Opinion by CONSTABLE, J.

The cause was argued before BOYD, C. J., BURKE, THOMAS, URNER, STOCKBRIDGE and CONSTABLE, JJ.

*L. Wethered Barroll and Robert J. Gill* (with whom were *Hope H. Barroll* and *E. Leo Dunnock*, on the brief), for the appellants.

*George W. Cameron*, for the appellee.



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## ADMINISTRATORS AND EXECUTORS.

**Duties of—.**

An administrator must see that the estate of his decedent is protected from unjust claims, but it is also his duty to aid in reaching a just conclusion as to them. *Cacy v. Slay.* p. 501

## ADMINISTRATION: LETTERS OF—.

1. **Domicile or residence.**

In determining in what county application should be made for letters of administration on an intestate's estate, the word "residence," as used in section 14 of Article 93 of the Code, means the fixed and permanent home or domicile of the deceased, as distinguished from a place of temporary abode.

*Whiting v. Shipley.* p. 117

2. Under section 14 of Article 93 of the Code, letters of administration upon the estate of an intestate can only be granted by the Orphans' Court of the county in which he had his domicile at the time of his death.

*Whiting v. Shipley.* p. 117

3. **Orphans' Court: province of—.**

It is the province of the Orphans' Court to determine the question of *residence* of an intestate, and their decision can not be reviewed in collateral proceedings.

*Whiting v. Shipley.* p. 118

## ADULTERY. See DIVORCE.

## ADVERSARY POSSESSION. See SALES IN EQUITY, 7.

## AGENCY. See ATTORNEYS-AT-LAW. BROKERS. CONTRACTS, 1. INSURANCE, 2.

1. **Taxicabs: presumption.**

There is a reasonable presumption that a person driving a team or taxicab is the agent or servant of the owner, unless it be shown that the contrary was the fact.

*Stewart Taxi-Service Co. v. Roy.* p. 76

## 2. —; rebuttal; question for jury.

Whether the proof offered is sufficient to rebut the presumption of agency is a question for the jury.

*Stewart Taxi-Service Co. v. Roy.* p. 76

## AGENTS AND ATTORNEYS. See ATTORNEYS-AT-LAW. CORPORATIONS. INSURANCE, 2.

**Personal liability.**

A contract of sale signed by one as attorney may render him personally liable, but does not bind the undisclosed principal.

*Coppage v. Howard.* p. 524

## AMENDMENTS. See DECLARATIONS, 1.

**APPEALS.** See CONDEMNATION OF LAND. CRIMINAL LAW, 4.**1. Equity: no appeal from reasons assigned in decree.**

The appeals allowed in equity cases by section 26 of Article 5 of the Code, "from final decrees or orders in the nature of final decrees," does not authorize an appeal from a statement in the opinion of the court in signing a decree.

*Hobbs v. Payne.* p. 290

**2. Immaterial errors: no reversals.**

The ruling of a lower court should not be reversed on appeal, even though erroneous, if no injury or prejudice were caused thereby.

*Simond v. State.* p. 34

**3. Prayers: exceptions to—.**

In order to present for the review of the Court of Appeals, the action of the trial court on a prayer that was objected to because unsustained by any evidence, a special exception must be noted.

*Fait v. Bannon.* p. 698

**4. Reversals: none, unless injury to appellant appears by record.**

Unless it appears from the record that the appellants have been injured by the order from which the appeal has been taken, the order will not be reversed on their appeal.

*Wingert v. Albert.* p. 84

5. Parties who were not injured by the ruling of the court below can not claim a reversal to correct an alleged error as to other persons.

*Wingert v. Albert.* p. 84

**6. Reversing without new trial: right to apply for new trial.**

Under section 22 of Article 5 of the Code, providing for the ordering of a new trial, when a case is reversed or affirmed on appeal, the court may reverse without ordering a new trial, but granting leave to the appellees to make application for a new trial, if they so desire, as to the granting of which application the court may then determine.

*Nat. Life Ins. Co. v. Fleming.* p. 188

**7. Second appeals: questions reviewed.**

Where a case, both in the lower court, and on appeal, was decided entirely upon questions presented by a demurrer to the declaration, the Court of Appeals, in a subsequent suit, between the same parties, and growing out of the same cause of

**APPEALS—Continued.**

action, may determine other questions not connected with the demurrer, without reviewing its former decision.

*Postal Telegraph Co. v. State Roads Comm.* p. 246

**ATTACHMENT.****1. Spendthrift trusts.**

While the language of the Code, section 10 of Article 9, provides that any kind of property or credits may be attached for a person's debts, it does not apply to, or cover, a contingent or uncertain interest in a trust estate.

*Safe Deposit and Trust Co. v. Ind. Brew. Asso.* p. 468

**2. Trust funds.**

The property devised in trust for a devisee is not liable to attachment, and can not be reached by his creditors by any process either at law or equity, where by the plain terms of the will, the right to the enjoyment of the income in the hands of the trustee is to the exclusion of his creditors.

*Safe Deposit and Trust Co. v. Ind. Brew. Asso.* p. 465

**ATTORNEYS-AT-LAW.****1. Investments for clients.**

An attorney, with general authority to invest, who invested eight hundred dollars of his client's money and seven hundred dollars of his own money in a loan, taking therefor one promissory note for fifteen hundred dollars secured by speculative stock, and receiving no compensation from his client for the investment, was not necessarily guilty of fraud for making an undisclosed arrangement with the borrower by which the attorney was to receive a percentage of any prospective enhancement in the value of the stock, when this undisclosed prospective profit could only have been received after repayment of his client's money. *Tippett v. Meyers.* pp. 537-538

2. A client who, in such case, knew shortly after the loan was made, over six years before the institution of the suit, what the character of the security was, and that the stock certificate was in the lawyer's name, and who finally severed relations with her counsel nearly four years before the institution of the suit, and failed to make any inquiry as to the circumstances of the transaction, did not exercise the usual and ordinary diligence

**ATTORNEYS-AT-LAW**—*Continued.*

necessary to suspend the running of limitations where ignorance of the cause of action is relied on for such suspension.

*Tippett v. Meyers.* p. 538

**3. Partnerships: limits of liability.**

A member of a law firm, not engaged in the business of investing moneys for clients, is not responsible for the acts of a co-partner in making an investment, which does not appear on the firm books and of which he has no knowledge.

*Tippett v. Myers.* pp. 534-535

**AUTOMOBILES.** See **NEGLIGENCE: ACTIONS FOR—, 3.**  
**TAXICABS.**

**BALTIMORE CITY.** See **BUILDING PERMITS.** **CONDEMNATION OF LAND.**

**1. Electric conduits: cost of moving wires.**

Under the terms of the lease between the City of Baltimore and the Consolidated Gas Electric Light and Power Company for the use of the City's cable conduits, where a change of location of the cables is ordered by the City, from one duct to another, without the assent of the Electric Company, one-half of the expense is to be borne by that Company and one-half by the City: *Held*, that, under the true construction of the contract, that the one-half expense referred to includes the new or additional cable wire which was necessary to such shifting.

*Consolidated Gas E. L. & P. Co. v. Balto. City.* p. 688

**2. Liability in damages: as proprietor; as governmental agency.**

The exercise by the City of its authority to provide for the safety of persons or property, where its corporate or proprietary interests do not require such action, is a governmental function for the non-performance of which it can not be sued, unless such a right of action is given by statute.

*Gutowski v. Balto. City.* p. 507

**3. Patapsco River: loading dynamite.**

The provisions in the Charter of Baltimore City, authorizing it to provide by ordinance for preserving the navigation of the Patapsco River and its tributaries; for establishing the limits beyond which piers, etc., may not be built; for cleaning and deepening the channels; for removing obstructions to navigation, etc.; for regulating the anchoring or moving of vessels; for regulating the use of wharves and piers, with penalties for

**BALTIMORE CITY—Continued.**

the violation of the same, do not confer any power to regulate the loading of explosives in vessels stationed either within or beyond the city limits, excepting as to the location and movement of vessels receiving or discharging such cargoes.

*Gutowski v. Balto. City.* p. 504

**4. Police regulations.**

Inasmuch as the Police Department of the City of Baltimore is controlled by a commission appointed by the Governor of the State, and operating independently of the municipal government, the city is not liable for damages on account of the non-performance of its police regulations, except in cases where its own conduct has produced the conditions which caused the injury.

*Gutowski v. Balto. City.* p. 505

**5. Taxation: street paving.**

To charge the United Railways of Baltimore City for the repaving of the streets, between and for two feet on each side of its tracks, when its charter provisions require it merely to keep such parts of streets in repair, is an illegal act, and can not be sustained under the amending power reserved in the Constitution, or any other power under the laws of Maryland.

*United Railways Co. v. Balto. City.* p. 674

**6. United Railways.**

The assessing of such special assessment upon the street railway is an attempted exercise of the taxing power for a public work which conferred no special benefit upon the corporation.

*United Railways Co. v. Balto. City.* p. 672

**BALTIMORE & OHIO RAILROAD.**

1. The special charter of the B. & O. R. R. Co., granted by the Act of 1826, constitutes a contract between the Railroad Company and the State, and the tax exemption conferred by section 18 of the charter is not one which it is within the power of the Legislature to modify or repeal, without the assent of the Railroad Company. *Baltimore & Ohio v. State.* p. 437

2. To affect a charter given before the Constitution of 1851, there must be both the action of the Legislature and the assent of the corporation. *Baltimore & Ohio v. State.* pp. 444-445

3. The acceptance by the B. & O. R. R. Co. of the rights contained in certain ordinances of the Mayor and City Council of Baltimore, amounting to police regulations of the laying of

BALTIMORE & OHIO RAILROAD—*Continued.*

tracks and switches, which acts were in themselves no new grant of power, but only the regulations by the City of the exercise of powers contained in the B. & O.'s original charter, is not such an acceptance of rights and privileges as to bring the B. & O. R. R. within the amendment of the State Constitutions of 1851 and 1867, by Chapter 195 of the Acts of 1890, now known as Article 3, section 48, and which provided in substance that every corporation accepting new rights, privileges or powers should be presumed to assent to the repeal of its exemptions from taxation. *Baltimore & Ohio v. State.* pp. 438-439.

4. In a mortgage executed by the Railroad Company, there was a covenant that the Railroad Company would discharge all "taxes and assessments, etc., lawfully imposed upon the railroad and other premises or property hereby mortgaged, etc.," provided nothing contained in the section should require the Company to pay any such tax, etc., so long as the Railroad Company in good faith contests the validity thereof, so that the priority of the indenture should be fully preserved in respect to such property. It was: *Held*, this was no surrender of the Company's right to exemption from taxation

*Baltimore & Ohio v. State.* p. 438

5. Such Act is an irrevocable contract, and is unaffected by Chapter 559 of the Acts of 1890, Chapter 120 of the Acts of 1896, or Chapter 712 of the Acts of 1906.

*Baltimore & Ohio v. State.* p. 450

6. The purchase by the B. & O. R. R. Co. of the shares of stock in its Washington Branch which were owned by the State was not an exercise of any new powers or franchise rights, and did not operate as a waiver or surrender of any tax exemptions.

*Baltimore & Ohio v. State.* pp. 440-441

7. As far as contractual obligations are concerned, the construction of the Washington Branch of the B. & O. R. R. under Chapter 158 of the Acts of 1830 and Chapter 175 of the Acts of 1832, was fully as much a contract between the State and the Railroad Company as was its original charter, and the limitations therein provided, as to the burdens to be imposed upon the corporation, are as amply protected as though contained in the original charter. *Baltimore & Ohio v. State.* p. 448

8. Chapter 155 of the Acts of 1878 was an Act passed for the settlement of counter claims between the State and the Balti-

**BALTIMORE & OHIO RAILROAD—Continued.**

more & Ohio Railroad Company, based upon a sufficient consideration, and contains all the elements of a contract requisite to bring it within the protection of Article 1, section 10, of the U. S. Constitution. *Baltimore & Ohio v. State.* pp. 445-448

**BALTIMORE PRACTICE ACT.****1. Pleas: extension of time for—; order in writing.**

Under the Baltimore City Speedy Judgment Act and its amendment by Ch. 184 of the Acts of 1894, the court may, for good cause shown, by its *order in writing*, passed at any time before judgment, extend the time for filing pleas and affidavits, and the right of the plaintiff to have judgment entered is suspended until the expiration of such extension; on appeal, in a suit brought under that Act, it was: *Held*, that where it did not appear from the record that there was any such order in writing, extending the time for additional pleas, and no writ of diminution was asked for, or granted, it must be assumed that the record is correct, and that no such leave was obtained, and the plaintiff, in such a case, could not be deprived of his judgment, if the prior pleas were insufficient, even though special pleas, filed without leave, constituted a good defense.

*Waldeck Co. v. Emmart.* p. 473

**2. —; effect of absence of order.**

Under the Baltimore City Speedy Judgment Act, as amended by Chapter 184 of the Acts of 1894, special pleas, although proper in themselves, if filed after a motion for a judgment by default, for want of proper pleas, are ineffectual to defeat the plaintiff's right to a judgment, unless it appears that the court passed an order in writing extending the time for filing pleas.

*Waldeck Co. v. Emmart.* p. 473

**3. Discretion of court.**

Under Chapter 107 of the Acts of 1914, amending the Speedy Judgment Act of Baltimore City, if a judgment by default is entered for failure of the defendant to file a sufficient plea, etc., the court may, upon motion filed within 30 days of the entry of the judgment, strike out the same, and reinstate the case, with leave to the defendant to file additional pleas within ten days thereafter, provided the court is of the opinion that the interests of justice will be promoted thereby.

*Waldeck Co. v. Emmart.* p. 476

**BANKRUPTCY.** See JUDGMENTS.**Discharge: effect of—.**

The discharge of a bankrupt is *personal*, and has no effect upon any liens subsisting at the time. *Frey v. McGaw.* p. 26

**BASTARDY PROCEEDINGS.**

In bastardy prosecutions, the proceedings before the Justice of the Peace, under Section 3 of Chapter 163 of the Act of 1912, are simply a preliminary examination for the purpose of holding the accused for court, if the evidence justifies it; and such section is not unconstitutional. *Hamilton v. State.* p. 314

**BENEVOLENT SOCIETIES.****Rules: construction of—; death benefits.**

The rules of a benevolent society, briefly speaking, provided that no claims could be made against it for the death of a member from any disease, which had demonstrated itself prior to his admission or reinstatement therein; it further provided that when a member was in arrears in his dues to a certain amount, it should amount to a disqualification as to all sick or death benefits on his account, until three months after the arrears and all current dues should have been paid. A member who was in arrears complied with the rules for reinstatement, and subsequently died of tuberculosis; there being no proof that he was afflicted with that malady before his admission into the order, it was: *Held*, that his beneficiaries were entitled to recover the death benefits.

*Nat. Council Jr. O. U. A. M. v. Barbour.* p. 103

**BILL OF PARTICULARS.** See CRIMINAL LAW, 5.**BROKERS.** See INSURANCE, 2.**1. Commissions.**

To entitle a broker to recover commissions for the sale or purchase of property, he must not only show his efforts or negotiations to accomplish the sale or purchase, but he must show that the sale or purchase was the result of such efforts or negotiations.

*Way v. Turner.* p. 329

**2. Fiduciary relation.**

A broker employed to sell real estate occupies a *quasi-fiduciary* relation, and must disclose all material facts which might influence the employer.

*Coppage v. Howard.* p. 523

**BROKERS—Continued.****3. Commissions: right to—.**

To entitle a broker employed to sell or find a purchaser of real estate to recover commissions, where no contract of sale is executed by his employer and the purchaser, he must show not only that he procured a person who was ready, willing and able to purchase the property upon the terms authorized by the vendor, but also that his employer was advised of that fact and given an opportunity to complete the sale to the proposed purchaser, and that it was because of the default of the vendor that the sale was not consummated.

*Coppage v. Howard.* pp. 522-523

4. In general, the mere fact that the broker finds a willing and capable purchaser is not sufficient to entitle him to commissions, unless his employer is given the opportunity of profiting thereby.

*Coppage v. Howard.* p. 523

5. A broker who fails or refuses to disclose the name of the purchaser he has procured, can not recover commissions, as for having made a sale.

*Coppage v. Howard.* p. 525

6. —; services rendered not availed of—.

A broker who fully discharges his duty and performs all that he undertakes to do, is entitled to recover for his services, without regard to the fact whether or not such services were beneficial or of value to his employer.

*Parker v. Power.* p. 609

**BUILDING PERMITS.****Mandamus: false representations.**

To obtain by a mandamus a building permit, for the erection of store buildings for general business purposes, and afterwards use the building for a lawfully forbidden use, and one for which an earlier application had been properly refused, would be a fraud on the court that issued the mandamus, and should be promptly checked.

*Stubbs v. Scott.* p. 93

CAMP-MEETINGS. See LEASES: CONSTRUCTION OF—, 9.

CHILDREN. See NEGLIGENCE: ACTION FOR—, 3.

**CODE OF PUBLIC GENERAL LAWS (1904).**

Art. 93, sec. 325—Testamentary law: meaning of words; die without issue. p. 109

## CODE OF PUBLIC GENERAL LAWS (1912).

- Art. 1, sec. 14—Rules of interpleader: the word persons to include corporation. p. 237
- Art. 2, sec. 17—Agents: when entitled to commissions. p. 522
- Art. 5, sec. 9—Appeals and errors: what questions open in Court of Appeals. pp. 79, 313, 352
- Art. 5, sec. 9A (Vol. 3)—Variance: question how to be raised; prayer. pp. 352, 539
- Art. 5, sec. 22—Appeals and errors: new trial; when awarded. p. 188
- Art. 5, sec. 26—Appeals and errors: in equity. p. 290
- Art. 5, secs. 36, 37—Appeals and errors: appeals from equity courts; exceptions to jurisdiction; must be made below. pp. 324, 325
- Art. 5, sec. 38—Appeals and errors: remanding of causes for new trial. p. 501
- Art. 5, sec. 80—Appeals and errors: appeals in criminal cases. p. 313
- Art. 5, secs. 84, 85—Appeals and errors: appeal from county commissioners. p. 577
- Art. 9, sec. 10—Attachments: what may be attached. p. 468
- Art. 12, (Vol. 3)—Bastardy and fornication. p. 313
- Art. 16, sec. 38—Chancery: divorce *a mensa et thoro*. p. 620
- Art. 16, sec. 228—Sale or lease of property for change of investment. p. 4
- Art. 21, sec. 92—Fifteen-year redeemable ground rents. p. 565
- Art. 21, sec. 93—Landlord and tenant: redemption of 5-year rents. pp. 153, 156
- Art. 23, sec. 87—Corporations: dissolution; process. p. 221
- Art. 23, secs. 93, 94—Foreign corporations: qualifying to do business in State. p. 637
- Art. 23, secs. 137-138, 140—Foreign corporations: qualifications to do business in State. p. 638
- Art. 23, secs. 184, 192—Corporations: insurance solicitors; license. p. 169
- Art. 23, secs. 218, 219—Insurance: broker's license. p. 167
- Art. 23, sec. 359—Telephone and telegraph companies: damages for erecting fixtures. pp. 246, 256
- Art. 26, sec. 19—Judgments: entry of—; lien. p. 25

CODE OF PUBLIC GENERAL LAWS (1912)—*Cont'd.*

- Art. 33, secs. 71, 73, 74-77—Elections: count of ballots; returns. pp. 301, 304-306
- Art. 33, secs. 82, 83, 85, 86—Elections: canvassing board; corrections of errors. pp. 300, 308
- Art. 33, sec. 86—Elections: board of canvassers; correcting errors. p. 132
- Art. 33, secs. 24, 89—Election Law: illegal registration; penalty for. pp. 32, 39
- Art. 33, sec. 185—Election laws: candidates' names to be alphabetically. pp. 123, 125
- Art. 33, sec. 199B (Vol. 3)—Election Laws: recount of ballots. pp. 121, 132
- Art. 35, sec. 3—Evidence: competency of witness. pp. 383, 496, 500
- Art. 45—Husband and wife: marital rights. p. 461
- Art. 51, sec. 13—Petit jurors: how selected. p. 285
- Art. 53, sec. 24—Landlord and tenant: redemption of 15-year ground rents. pp. 153, 159, 566
- Art. 56, sec. 149—Licenses: motor vehicles; brakes; horns; lights. p. 75
- Art. 59, sec. 4—Insanity as a defense in criminal cases: provinance of jury. p. 627
- Art. 63, secs. 11, 41—Mechanics' lien: contract with other than owner; notice must be given. pp. 390, 393
- Art. 66, sec. 25—Mortgages: notes secured by mortgage; property of owner of record. p. 499
- Art. 67, sec. 2—Negligence causing death: action to recover for. p. 205
- Art. 75, sec. 12 (Vol. 3)—Pleading and practice: set-off. p. 458
- Art. 75, sec. 24, sub-sec. 108—Pleading: question of partnership. p. 530
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- Art. 75, sec. 71—Pleading and practice: ejectment. pp. 397-400
- Art. 75, sec. 86—Pleading and practice: defendant to plead. p. 413

CODE OF PUBLIC GENERAL LAWS (1912)—*Cont'd.*

- Art. 81, sec. 124—Revenue and taxes: collateral inheritance tax; real estate of decedent to be appraised. p. 82
- Art. 83, sec. 90—Uniform Sales Act: breach; rights. p. 69
- Art. 91, sec. 48—State roads: purchasing Conowingo bridge. p. 245
- Art. 91, secs. 67 to 78—Shoemaker Road Law. p. 581
- Art. 93, sec. 1—Testamentary law: accounts; time. p. 274
- Art. 93, sec. 14—Testamentary law: letters; when granted. p. 117
- Art. 93, sec. 121—Testamentary law: distribution of personality. p. 432
- Art. 93, sec. 126—Testamentary law: father next of kin of daughter. p. 595
- Art. 93, sec. 326—Testamentary law: devises and legacies not to lapse; proviso. p. 112
- Art. 101, secs. 55, 56, 60 (Vol. 3)—Workmen's Compensation Law: appeal; mode. pp. 192, 193, 194

## CODE OF PUBLIC LOCAL LAWS.

- Art 2, secs. 229, 230—Anne Arundel Co.: tax sales; notice. pp. 398, 399

## CONDEMNATION OF LAND.

1. **Jury trial: rights of party condemning.**

Section 40 of Article 3 of the Constitution of Maryland, prohibiting the taking of private property for public use without just compensation as agreed between the parties, or awarded by a jury, does not prohibit the enacting of laws conferring such right of a jury trial upon other, or all, parties to condemnation proceedings.

*Patterson v. Baltimore City.* pp. 235-236

2. —; **rights of City of Baltimore.**

Under such section of the Constitution, the Legislature may confer the right to a jury trial upon the Mayor and City Council of Baltimore, even in a case where the appeal was taken by the other party. *Patterson v. Baltimore City.* pp. 237, 238

3. The provision in section 179 of the Charter of Baltimore City (Chapter 123 of the Acts of 1898), to the effect that the "persons" appealing to the City Court from the amounts of assessments or damagess allowed in condemnation cases shall

# CONDEMNATION OF LAND—*Continued.*

be secured in the right of a jury trial," applies as well to the City as to the landowner. *Patterson v. Baltimore City.* p. 236

4. In such proceedings, the City is entitled to a jury trial, even though the appeal was taken by the other party.

*Patterson v. Baltimore City.* pp. 237, 238

## 5. Value: sales of similar lands.

In establishing the value of lands, the prices realized at sales of similar lands in the vicinity, made within a reasonable period of time theretofore, at voluntary and not forced sales, are admissible in evidence.

*Patterson v. Baltimore City.* p. 241

6. The determination of the degree of similarity that must exist, in order to admit such evidence, and the nearness in respect to time and place, must largely be left to the discretion of the trial judge.

*Patterson v. Baltimore City.* p. 241

7. —; possibilities too remote; car lines.

In determining the value of lands taken by condemnation proceedings for the opening of streets, etc., the possibility of a car line being constructed upon the street to be opened, is too speculative to be considered.

*Patterson v. Baltimore City.* p. 242

CONFESSIONS. See CRIMINAL LAW, 6, 7.

CONSPIRACY. See STATE'S EVIDENCE.

CONSTITUTIONAL LAW. See COURTS AND LEGISLATURE.

## 1. Corporations: amendment of charters.

The amendment to the State Constitution now known as section 48 of Article 3, to alter, repeal or amend the charters of corporations, does not confer unlimited power upon the State; it was not intended to deprive the citizen of his property contrary to the law of the land, or to take private property for public use without just compensation.

*United Ryys. Co. v. Baltimore City.* p. 673

2. The same degree of fair dealing which is enforced between individuals must be applicable when the parties are the State and a corporation having contractual relations with it.

*Baltimore & Ohio Railroad v. State.* p. 449

3. The Constitutions of 1851 and 1867 do not deny to the State all power to enter into a contract with a corporation, irrevocable in its nature. *Baltimore & Ohio Railroad v. State.* p. 447

## CONSTITUTION OF MARYLAND (1851).

Art. 3, sec. 46—No taking of private property without compensation. p. 239

Art. 3, sec. 47—Charters of corporations: subject to repeal. pp. 444, 446, 663

## CONSTITUTION OF MARYLAND (1864).

Art. 3, sec. 39—Taking of private property without compensation. p. 239

## CONSTITUTION OF MARYLAND (1867).

Art. 3, sec. 27—How laws may become legal. p. 58

Art. 3, sec. 29—Style of laws: enactment. p. 60

Art. 3, sec. 40—Taking of private property without compensation. pp. 235, 238

Art. 3, sec. 48—Charters of corporations subject to repeal. pp. 438, 447, 664

Art. 4, sec. 12—Contest over certain offices must be made before Legislature. p. 299

Art. 15, sec. 5—Jury judge of law as well as fact in criminal cases. p. 628

Art. 15, sec. 6—Trial by jury. p. 577

## CONSTITUTION OF UNITED STATES.

Art. 1, sec. 10—Taxes to be laid by statute only. pp. 437, 445

## CONTRACTS. See CONSTITUTIONAL LAW, 3. DECEDENTS: SERVICES TO—.

## 1. —; by agents.

Where a contract was made with the agents of a corporation, as such agents, so that the agents might maintain an action in their own names to recover damages sustained by their principal for the breach of the contract, such agents in a suit against them brought upon such contract, may recoup for such damages as their principal has sustained

*Strasbaugh v. Sanitary Can Co.* p. 647

## 2. Employment: no fixed term—.

No action will lie for the breach of a contract of employment unless there is a definite fixed time for the continuance of the contract; otherwise the hiring would be merely at will, to be terminable at pleasure. *W. B. & A. R. R. Co. v. Moss.* p. 21

## CONTRACTS—*Continued.*

### 3. Hardships: should not be affected by mere—.

When the terms of a contract are clear and unambiguous, courts have no right to make new contracts for the parties, or ignore those already made by them, simply to avoid ensuing hardship. *Miller v. Home Ins. Co.* p. 146

### 4. Right to insist on performance.

A person entering into a contract has a right to insist on its performance in all particulars, according to its meaning and spirit; but if he chooses to waive any terms introduced for his benefit, he may do so.

*Bluthenthal v. May Advertising Co.* p. 282

### 5. Vagueness.

In order to constitute a verbal or written agreement, the parties must express themselves in such terms that it can be ascertained, to a reasonable degree of certainty, what they mean.

*W. B. & A. R. R. Co. v. Moss.* p. 20

6. If the agreement is so vague and indefinite that it is not possible to collect from it the full intention of the parties, it is void.

*W. B. & A. R. R. Co. v. Moss.* p. 20

7. Neither court nor jury can make an agreement for the parties.

*W. B. & A. R. R. Co. v. Moss.* p. 20

### 8. Construction: for the court.

The construction of a written contract is for the court.

*Phoenix Pad Co. v. Roth.* p. 543

9. In construing written contracts, a court is entitled to place itself in the same position as that of the parties who made the contract, so as to view the circumstances as the parties viewed them, and to judge of the meaning of the words and of the application of the language to the thing described.

*Phoenix Pad Co. v. Roth.* p. 544

10. What parties to a contract meant to say, must be gathered from what they did say, viewed from the standpoint they then occupied.

*Phoenix Pad Co. v. Roth.* pp. 543-544

### 11. Oral and preliminary negotiations.

In general all oral negotiations or stipulations between the parties to a written contract, preceding or accompanying its execution, are to be regarded as merged in it, and the latter treated as the exclusive medium of ascertaining the agreement by which the contracting parties bound themselves.

*Phoenix Pad Co. v. Roth.* p. 545

CONTRACTS—*Continued.***12. Breach: damages.**

When parties have made a contract which one of them has broken, the damages which the other party ought to receive should be such as may fairly and reasonably be considered as arising either naturally—that is, according to the usual course of things—from such breach itself, or, such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of its breach.

*Strasbaugh v. Sanitary Can Co.* pp. 648-649

13. If the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach under the special circumstances so known and communicated.

*Strasbaugh v. Sanitary Can Co.* p. 649

14. If such special circumstances were wholly *unknown* to the party breaking the contract, he, at the most, can only be supposed to have had in his contemplation the amount of injury which would arise generally, and in a great majority of cases, not affected by any special circumstances, for such a breach.

*Strasbaugh v. Sanitary Can Co.* p. 649

15. If the special circumstances had been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be unjust to deprive them.

*Strasbaugh v. Sanitary Can Co.* p. 649

16. In actions *ex contractu*, wherever it is reasonably certain or apparent that profits would have been realized had the contract been completed according to its terms, and the profits of the bargain are the only things purchased or contracted for, and are the direct and immediate proof of the contract, there, though the *amount* of the profits be open to dispute or controversy, still, such profits as the evidence shows would have resulted but for the breach of the contract by the defendant, are a legitimate element of damages; but whenever it is purely problematical whether any profits would have been realized at all by reason of contingencies which might never happen or

### CONTRACTS—*Continued.*

where the profits have reference to dependent and collateral engagements entered into on the faith of the performance of the principal contracts, then, without regard to any uncertainty as to mere *amounts*, probable profits can not be recovered because too speculative, indefinite and remote.

*Strasbaugh v. Sanitary Can Co.* pp. 649-650

#### 17. Written: signed unread.

Before a court can grant a prayer withdrawing a case from the consideration of the jury, on the ground of want of evidence, it must assume the truth of all the evidence tending to sustain the claim, or defense, as the case may be, and all inferences of fact, fairly deducible from it, and this although such evidence be contradicted in every particular by the opposing evidence.

*McGrath v. Peterson.* p. 414

18. A party who, being able to read, deliberately signs a contract without reading, or scrutinizing it, can not escape liability under it, occasioned by his own carelessness, unless his signature to the contract was occasioned by fraud or duress.

*McGrath v. Peterson.* p. 416

19. And if there is any evidence of any such fraud, etc., it is error not to submit it to the consideration of the jury.

*McGrath v. Peterson.* p. 418

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE.

CORPORATIONS. See CONSTITUTIONAL LAW. STOCK DIVIDENDS.

#### 1. Attorneys not officers.

The attorney of a corporation is not an "officer" of the corporation, within the sense of the statute providing for service of writs upon corporations.

*Washington and Rockville Rwy. Co. v. Johnson.* p. 221

#### 2. Service: acceptance of—; attorneys.

Section 5 of Chapter 424 of the Acts of 1912, providing for the service of writs upon the attorney of a corporation, relates only to cases of violations of the provisions of that Act, and confers no general authority on such an attorney to accept service as upon an officer of the corporation.

*Washington and Rockville Rwy. Co. v. Johnson.* p. 221

CORPORATIONS: FAIR DEALINGS WITH.— See  
CONSTITUTIONAL LAW, 2.

CORPORATIONS: FOREIGN.

1. Process: liable to what—.

A foreign corporation that has complied with the statutes so as to enable it to do business in this State, is amenable to the process of any of the courts in the State.

*Brenner v. Brenner.* p. 192

2. Certificate of secretary of state: time for filing.

The certificate of the Secretary of State required by section 93 of Article 23 of the Code of 1912, to the effect that a foreign corporation has complied with all the provisions of the law that are, by the statute, made necessary before such corporation is allowed to do business within the State, is sufficient if it is in substantial compliance with the law.

*Strasbaugh v. Sanitary Can Co.* p. 640

3. The admission of such certificate in evidence can not be successfully objected to, in a suit by such corporation, upon the ground, merely, that it is dated after the date of the institution of the suit or the filing of pleas by the defendant.

*Strasbaugh v. Sanitary Can Co.* p. 640

COURTS.

Presumption in favor of—.

The presumption of law is in favor of the correctness of decrees of a lower court, until it is shown, by the record to the Court of Appeals, to be erroneous.

*Mary E. Earle v. Thomas J. Keating.* p. 697

COURTS AND LEGISLATURE.

It is for the Legislature, and not for the courts, to extend the laws, when it may deem advisable, so as to cover cases not provided for in existing statutes.

*State v. Geddes.* p. 170

CRIMINAL LAW. See INDICTMENTS. CONSPIRACY.

1. Address to jury: judge's right to correct—.

It is the right and may be the duty of a judge to express his dissent from unwarrantable statements of law made by counsel in addressing the jury.

*Simond v. State.* pp. 33-34

# CRIMINAL LAW—*Continued.*

## 2. Appeals: section 80 of article 5 of code.

By section 80 of Article 5 of the Code, the proceedings on appeal, in criminal cases, are the same as on appeals from civil suits.

*Hamilton v. State.* p. 313

3. Section 9 of Article 5 is applicable to criminal, as well as civil, cases.

*Hamilton v. State.* p. 313

## 4. Appeals: briefs; time for printing—.

On an appeal from a conviction for a capital offense, a motion for the affirmance of the judgment on the ground that the brief for the appellant was not printed prior to the time when the case was reached for argument, as provided by Rule 36 of the Rules of the Court of Appeals, will not be granted, where the Court thinks the ends of justice would not be subserved by the rigid enforcement of the rule.

*Deems v. State.* p. 630

## 5. Bill of particulars.

Action upon a demand for a bill of particulars, in criminal as well as in civil proceedings, is a matter that rests within the sound discretion of the court.

*Simond v. State.* pp. 31-32

## 6. Confessions.

Where the evidence shows that a confession was not influenced by any promise, threat or inducement of any kind, it is admissible in evidence.

*Deems v. State.* p. 630

7. The fact that prior to the confession, an officer asked accused "why he didn't tell the truth," saying that "the truth would hurt no one," and the fact that another officer spoke to the accused of his accountability hereafter, and said: "Why don't you tell it right, you are lying all through?" did not amount to such an improper influence as to render the confession inadmissible.

*Deems v. State.* p. 630

## 8. Court and jury: province of—.

The court has no authority to decide as to the effect or sufficiency of evidence submitted to the jury on such an issue.

*Deems v. State.* p. 628

## 9. Instructions: court no right to give—.

No instructions can be given by the court in a criminal case, except in a merely advisory form.

*Deems v. State.* p. 628

## 10. Exceptions: time for reserving—.

On appeal from a trial for a capital offense, the rule as to the time for reserving exceptions should not be so strictly construed as in the case of appeals in civil cases.

*Deems v. State.* p. 630

CRIMINAL LAW—*Continued.*

## 11. Insanity as defense.

Under the Code of 1912, Article 59, section 4, when any person indicted for crime shall allege insanity in his defense, the jury empaneled to try such person shall find by their verdict whether such person was, at the time of the commission of the offense, or still is insane, lunatic or otherwise.

*Deems v. State.* p. 627

12. Where such a defense is distinctly presented, and the case is not wholly devoid of evidence tending to sustain that theory, it is the constitutional right of the accused to have the jury determine whether or not he was, in law, criminally responsible for the crime for which he was being tried *Deems v. State.* p. 628

## 13. Remarks by judge: effect of—.

During the course of a criminal prosecution where the Court, in the presence of the jury, made a statement as to the law bearing upon a question before them, no reversible error is presented if the Court subsequently informs the jury that his comments were advisory merely, and that the jury were the judges both of the law and of facts.

*Simond v. State.* p. 40

DAMAGES. See INSURANCE.

## DECEDENTS: SERVICES TO—.

1. As between persons not members of the same family, the mere fact of rendering services useful to the party to whom they are rendered, furnishes *prima facie* evidence of their acceptance; and, in the absence of any proof to the contrary, there is an obligation to pay what the services are worth, in the absence of proof of special value.

*Marx v. Marx.* p. 375

2. But where services are rendered by a member of the family the presumption of law is that the services are gratuitous.

*Marx v. Marx.* pp. 375-376

## 3. —; limitations.

Where the only evidence of an intention to pay fixes the time as at the death of the party to whom the services were rendered, the Statute of Limitations can not attach before that date.

*Marx v. Marx.* p. 382

4. In order to justify a claim of services being allowed against a decedent, there must have been a design, at the time of the rendition, to charge, and an expectation on the part of the recipient to pay for the services. The services must have been of

DECEDENTS: SERVICES TO—*Continued.*

such a character, and rendered under such circumstances, as to fairly imply an understanding of payment and a promise to pay. There must have been an express or implied understanding to such an effect. *Marx v. Marx.* p. 376

5. Without having to be experts, persons who were personally familiar with the character and extent of the services rendered may testify as to what was their value. *Marx v. Marx.* p. 384

## 6. Evidence.

In such a suit, it appeared that on several occasions, when the plaintiff was sick, the wife employed another woman to assist in caring for the decedent; evidence of such employment is admissible, as tending to show the condition of the decedent and the extent of care and attention the plaintiff was required to give him. *Marx v. Marx.* p. 383

7. The testimony of witnesses who had frequently talked with the plaintiff while she was rendering the services, is admissible, to show that she had said she expected to be paid for them.

*Marx v. Marx.* p. 383

## 8. Experts.

Without having to be experts, persons who were personally familiar with the character and extent of the services rendered may testify as to what was their value. *Marx v. Marx.* p. 384

## 9. Board.

In an action against the estate of a decedent, for board furnished by his son, the testimony of a witness, to whom the decedent read a paper written by him bearing upon that question, is admissible as reflecting upon the issue.

*Marx v. Marx.* p. 387

## DECLARATIONS. See LIFE INSURANCE, 3.

## 1. Amendments: when a new cause of action.

If by an amendment to a declaration a new cause of action is made, then, in considering whether a plea of limitation filed constituted a good defense, the time for the running of the statute is to be taken as extending to the date of such amendment. *Strasbaugh v. Sanitary Can Co.* p. 642

2. Where the amendment to a declaration involves the same cause of action, on the same consideration, and leaves unchanged the liability of the defendant, it is not to be taken as a change

DECLARATIONS—*Continued.*

of the cause of action, although in the amendment reference is made to a preceding contract upon which the contractors' suit was based, and which preceding contract was not mentioned in the original declaration.

*Strasbaugh v. Sanitary Can Co.* pp. 642-643

DECREES. See EQUITY.

## DEEDS: VOLUNTARY.

**Effect of—: burden of proof.**

While a gift obtained by any person standing in a confidential relation to the donor is *prima facie* void, and the burden is thrown on the donee to establish to the satisfaction of the court that it was the free, voluntary and unbiassed act of the donor, yet when that burden is discharged, and there is no question of capacity or undue influence, a court will not strike down a voluntary deed merely to gratify the caprice of the grantee, or because of subsequently changed relations between the parties.

*Jervis v. Jervis.* pp. 138-139

## DESCENT AND DISTRIBUTION.

## 1. Heirs.

Where one, to whom an estate for life was devised to take effect after the death of a life tenant, and then to his heirs, dies before the first life tenant, then, whether the estate devised to the second life tenant be considered as one that was vested but defeasible, or as merely contingent, the share he would have received becomes vested, by way of substitution or succession, in the persons to whom the will refers as his heirs.

*Shriver v. Shriver.* p. 488

## 2. Widow: not one of—.

A widow is not, in a technical sense, an "heir" of her husband, as to his realty.

*Shriver v. Shriver.* p. 489

3. The word "heir" is technically and literally applicable only to one who *inherits* real estate.

*Shriver v. Shriver.* p. 489

4. The title of an heir originates at the death of the person from whom he inherits; he takes a fee by descent.

*Shriver v. Shriver.* p. 489

## 5. —; dower.

The widow's dower attaches as an inchoate interest during her husband's life; it is a limited life estate.

*Shriver v. Shriver.* p. 489

DESCENT AND DISTRIBUTION—*Continued.*6. **Personalty.**

Where personal property was devised to remaindermen named, "or to their heirs," and one of the parties died before a preceding life tenancy expired, it was: *Held*, that one-half of his share of such property should be distributed to his widow, as under the Statute of Distribution, there being no children or descendants of such legatee. *Shriver v. Shriver.* p. 492

## DIVORCE.

1. **Abandonment.**

For a divorce *a mensa et thoro* to be granted under Article 16, section 38 of the Code, on the ground of abandonment and desertion, the complainant must show that the abandonment was the deliberate act of the party complained of, done with the intent that the marriage relation should no longer exist.

*Hubbard v. Hubbard.* p. 620

2. —; not ground for divorce *a mensa*.

Adultery can not be made the basis of a divorce *a mensa et thoro*, but only of a divorce *a vinculo matrimonii*.

*Hubbard v. Hubbard.* p. 619

3. **Adultery.**

A bill for a divorce *a mensa et thoro* and for alimony was filed by a wife on the ground of adultery, and abandonment and desertion by her husband, without just cause or excuse; the evidence showed that the separation was brought about and continued through the consent and wish of the wife, who refused to have her husband live with her unless he should discharge from his employ a bookkeeper, with whom the wife charged he had been having adulterous relations; the husband refused to discharge her, and left the complainant; there was no evidence to sustain the charge of infidelity made by the wife, and no evidence that the husband desired to permanently abandon his wife: *Held*, that the relief prayed should not be granted.

*Hubbard v. Hubbard.* p. 622

4. Separation and intention to abandon must concur in order to constitute cause of divorce on the ground of abandonment; but they need not be identical in their commencement.

*Hubbard v. Hubbard.* pp. 620-621

DOMICILE. See HUSBAND AND WIFE.

DRIVERS OF VEHICLES. See AGENCY.

DYNAMITE. See BALTIMORE CITY, 2, 3.

## EJECTMENT.

### 1. Pleas: not guilty; effect of—; damages.

In an action of ejectment, a plea of not guilty admits the possession of, and ejectment by, the defendant, and detention of the property by him, and it only puts in issue the title of the premises, the right of possession and the amount of damages to which the plaintiff is entitled. *Abromatis v. Amos.* p. 397

2. In an action of ejectment, the *bona fide* occupant of the lands is entitled to recover for improvements made by him thereon—*i. e.*, not the cost to him of the improvements, but the amount by which they enhance its value to the owner.

*Abromatis v. Amos.* p. 399

3. Under section 71 of Article 75 of the Code, the plaintiff in ejectment may recover damages for the ejectment and *mesne* profits down to the time of the termination of the case; and such *mesne* profits may be shown by proof of the probable rental value of the property. *Abromatis v. Amos.* p. 400

4. Where the defendant has had the use and possession of the property, the plaintiff is entitled to recover substantial damages. *Abromatis v. Amos.* p. 402

## ELECTION LAWS.

### 1. Ballots: marking—; black lead pencils.

The requirement of section 185 of Article 33 of the Code, that election ballots shall be marked with a black pencil, are not violated by marking them with a black indelible pencil.

*White v. Laird.* p. 126

### 2. Supervisors of—: appeals; quasi-judicial.

The powers and jurisdiction, given to the Supervisors of Elections by section 199 B of Article 33 of the Code, to hear and determine appeals from the action of judges of election, etc., require them to exercise judgment and discretion, and to act in a *quasi-judicial* capacity. *White v. Laird.* p. 123

### 3. Presumptions: mandamus.

In the absence of improper motives on the part of the Supervisors, no appeal lies from their decisions in matters over which they have control; nor will a writ of mandamus be issued to control their action. *White v. Laird.* pp. 129-132

ELECTION LAWS—*Continued.***4. Recounts: board of canvassers.**

The Board of Canvassers have no power to reject the returns of an election precinct on the ground that the strip of paper required by Art. 33 of the Code to be pasted on the ballot box has been torn, broken and virtually destroyed. The ballot boxes used at an election are not part of the returns and are not before the Board of Canvassers, as such, and at the time of the canvass they should be in the custody of the Clerk of the Circuit court for safekeeping. *Canvassers, &c., v. Noll.* pp. 300-301

5. In case of a contest, the condition of the ballot boxes may become material and pertinent, but not at the canvass by that Board provided for by Article 33.

*Canvassers, &c., v. Noll.* p. 301

**6. Ballot boxes.**

The ballot boxes of an election form no part of the election returns, referred to in sections 82 and 83 of Article 33 of the Code, and the Board of Canvassers, as such, have no right to have the ballot boxes before them.

*Canvassers, &c., v. Noll.* p. 300

7. While the conditions of the ballot boxes may be pertinent and material in an election contest, it can not present a question for the decision of the Board of Canvassers.

*Canvassers, &c., v. Noll.* p. 301

**8. —; tally sheets.**

Where tally sheets, returned by the judges and clerks of an election, differ, the statute does not authorize or require the Board of Canvassers to decide or choose between them.

*Canvassers, &c., v. Noll.* p. 304

**9. —; mistakes of judges, etc.; how corrected.**

In such cases, if it clearly appears that mistakes have occurred in any of the statements or tallies made to the Board of Canvassers, it is their duty, under section 85 of Article 33, to subpoena the judges and clerks who made the returns, etc., who must appear and make such corrections as the facts of the case may require.

*Canvassers, &c., v. Noll.* pp. 306-307

10. One tally sheet of an election district had 275 marks for one candidate, named O'Malley (there being six instead of five marks in each of three blocks), and the other only had 272 marks for that candidate. The four judges and two clerks

**ELECTION LAWS—Continued.**

certified on both tally sheets, and in their written returns, that 272 votes were cast for O'Malley. *Held*: that the Board of Canvassers were not justified in counting 275 votes for O'Malley. *Canvassers, &c., v. Noll.* pp. 307, 311

**ELECTRIC RAILWAYS. See NEGLIGENCE.****1. Collisions: bell at crossing.**

Where a plaintiff, injured by a collision with an electric car, saw the car approaching the crossing in time not to have gone upon the track, the fact that the agents of the defendant failed to ring any bell while approaching the crossing is immaterial.

*Westerman v. United Rwys.* p. 230

**2. Speed: city and country.**

The duty as to the operation of electric cars in cities and over cross streets has no application to operating cars in the open country, where it is known that the cars are permitted to be run at much higher speed.

*Westerman v. United Rwys.* p. 231

**3. —; not stopping for passengers.**

No rule of law requires a street railway company to stop its cars at all points upon signal to take on passengers.

*Westerman v. United Rwys.* p. 231

**4. Duties of motormen.**

The rights and duties of the operators of electric cars and of motor trucks in their use of the streets are co-extensive and reciprocal.

*United Rwys. v. Mantik.* p. 200

5. It is as much the duty of the motorman to exercise due care in running the cars over crossings, as it is the duty of a motor truck driver to act prudently in the management of the motor vehicle, as it draws near a point of possible danger.

*United Rwys. v. Mantik.* p. 200

**ELLCOTT CITY. See ROAD LAWS.****EQUITABLE DEFENSES.**

A defense good at law can not be pleaded as an equitable defense.

*McGrath v. Peterson.* p. 413

**EQUITY. See APPEALS, 1. DECREES. INJUNCTIONS.****SALES IN EQUITY. SPECIFIC PERFORMANCE.**

The reasons assigned for a decree are no part of the decree itself.

*Hobbs v. Payne.* p. 290

**ESTOPPEL.** See **INSURANCE**, 3. **RES ADJUDICATA.**

**EVIDENCE.** See **CONFESSIONS.** **EXPERTS.** **MOTIVES.**  
**RES ADJUDICATA.** **STATE'S EVIDENCE.**

**1. Accounts: effect of rendering.**

The principle that where an account rendered by one party to another, with whom he has had relations, is retained by that party an unreasonable time, without his making any objection to its accuracy, the account may be considered as correct, has no application where the parties are strangers, in no contractual relation.

*Richardson v. Saltz.* pp. 392-393

**2. Admission of improper.**

The admission of evidence that should have been excluded is no ground for reversal, when it is apparent that no injury resulted therefrom.

*Furness-Withy & Co. v. Fahey.* p. 338

**3.** The wrongful admission of evidence is not a reversible error, if it appears that the party excepting to it was not injured by its admission.

*Strasbaugh v. Sanitary Can Co.* p. 641

**4. Exclusion of proper—: when no ground for reversal.**

No reversible error can be predicated upon the admission of evidence over objection, when the same evidence is admitted elsewhere in the case without objection.

*Furness-Withy & Co. v. Fahey.* p. 337

**5.** The ruling of a court sustaining an objection to evidence can not be reversible error, when the same is elsewhere admitted in the case without objection.

*State v. N. Y., P. & N. R. R. Co.* p. 680

**6. Immaterial error.**

In an action of ejectment, it was a question as to the admissibility of the testimony of a witness for the plaintiff as to the rental value of the land; his evidence was that the value was \$120.00 per annum; the evidence of the defendant's witnesses was that the land was worth about \$35 per acre; the jury awarded \$28.00; it was: *Held*, that the party excepting not having been injured by the testimony, it could not present a case of reversible error.

*Abromatis v. Amos.* pp. 400-401

**7. Interest of witness.**

The fact that a wife is suing a decedent's estate, for services rendered by her to the decedent, while the husband is suing the estate for board that had been furnished to the decedent, does not render the husband incompetent, on account of interest,

**EVIDENCE—Continued.**

from testifying to the wife's suit as to transactions between his wife and the decedent. *Marx v. Marx.* p. 383

**8. Jail records.**

While the jail record of a witness may be inquired into, or proved, in order to affect his credibility, evidence of his being confined in jail, 10 years previously, on a conviction for drunkenness, is not material on a trial for election frauds.

*Simond v. State.* p. 39

**9. Land values: sales in neighborhood.**

In establishing the value of lands, the prices realized at sales of similar lands in the vicinity, made within a reasonable period of time theretofore, at voluntary and not forced sales, are admissible in evidence. *Patterson v. Baltimore City.* p. 241

**10.** The determination of the degree of similarity that must exist, in order to admit such evidence, and the nearness in respect to time and place, must largely be left to the discretion of the trial judge. *Patterson v. Baltimore City.* p. 241

**11.** In determining the value of lands taken by condemnation proceedings for the opening of streets, etc., the possibility of a car line being constructed upon the street to be opened, is too speculative to be considered. *Patterson v. Baltimore City.* p. 242

**12. Parol: void instruments, etc.; proof.**

The rule excluding parol evidence to affect a written contract is not infringed by evidence to show that the instrument was void, or that it never had any legal existence or binding force, by reason of there being no meeting of the minds.

*Furness-Withy & Co. v. Fahey.* pp. 336-337

**13. Thoughts of witnesses.**

It was error to permit the plaintiff (who had brought suit for moneys lost by an attorney to whom she had entrusted them for investment) to testify what she *thought* was his law partner's connection with the transaction. *Tippett v. Myers.* p. 535

**14. Weight and correctness: for the jury.**

The weight and correctness of evidence is for the jury, and not for the court. *Western Un. Tel. Co. v. Bloede.* p. 354

**15. Jury: province of—; conflicting evidence.**

Where the evidence is conflicting and irreconcilable, the case is one for the consideration of the jury.

*Stewart Taxi-Service Co. v. Roy.* p. 77

## EVIDENCE: ADMISSIBILITY OF—.

—; parts of answers.

Where part of the answer of a witness is admissible, it is error to strike out the whole answer. *Marx v. Marx.* p. 387

EVIDENCE: SIMILAR FACTS. See CONDEMNATION OF LAND, 5.

EXCEPTIONS. See CRIMINAL LAW, 10.

EXPERTS. See DECEDENTS: SERVICES TO—, 8.

**Cabinet-Makers.**

A witness who has testified that he was a cabinet-maker, and that he was familiar with the cost of repairing furniture, and that he had seen the furniture for which damages were being claimed, for its injury by fire because of the defendant's negligence, is competent to testify as to the cost of repairing the furniture. *American Paving Co. v. Davis.* p. 483

FIRE. See INSURANCE: FIRE.

FRATERNAL ORDERS. See BENEVOLENT SOCIETIES.

FRAUD. See LIMITATIONS.

FREIGHT ELEVATORS. See NEGLIGENCE: ACTIONS FOR—, 16.

GIFTS. See DEEDS: VOLUNTARY.

HEIRS. See DESCENT AND DISTRIBUTION. DIVORCE.

HUSBAND AND WIFE. See DESCENT AND DISTRIBUTION.

**1. Alienation of wife's affections.**

An action by a husband will lie against anyone who has wrongfully alienated the affections of his wife and deprived him of his conjugal rights. *Francis v. Outlaw.* p. 316

2. But in suits of that character against one of his wife's parents, the burden of proof is upon the plaintiff to show that the defendant was prompted by malice in what he had said or done, and the plaintiff must overcome the presumption that the actions complained of were due merely to what the defendant believed to be for the real good of his child and under the influence of natural affection for her. *Francis v. Outlaw.* pp. 317-318

HUSBAND AND WIFE—*Continued.***3. Domicile.**

The general rule is that, in the absence of a decree of separation or divorce, the legal domicile of a wife follows that of her husband.

*Whiting v. Shipley.* p. 118

**4. —; when separated.**

The mere fact of their living apart does not affect the question, unless there is a judicial decree of divorce or of separation.

*Whiting v. Shipley.* p. 118

**5. Property rights: leasehold; tenants by the entireties; survivorship.**

Where a husband and wife own leasehold property, as tenants by the entireties, upon the wife's death, her interest in the property devolves upon her husband, subject to all outstanding liens.

*Frey v. McGaw.* p. 28

**6. —; administration unnecessary.**

In such a case, the husband's right and title are acquired independent of the medium of administration.

*Frey v. McGaw.* p. 28

**7. Purchase of land with wife's money.**

If, with the knowledge and acquiescence of the wife, her money is used to purchase property and the title thereto is taken in the name of the husband, she can not claim as creditor of the husband, in the absence of an express promise of the husband at the time to repay to her.

*Nihiser v. Nihiser.* pp. 455-456

**8. Relation of debtor and creditor, or surety.**

A wife, a beneficiary of a trust estate, permitted her husband to receive her income from her trustee, which was used to purchase real estate the title to which was taken in the husband's name; subsequently money was borrowed by the wife from her trust estate, the loan being secured by a mortgage on the property, the husband continuing to receive the wife's income. Upon a foreclosure of the mortgage, the excess was claimed by the wife, holding a judgment against the husband, and by the husband, alleging that the debt secured by the mortgage was the sole and separate debt of the wife, and that the property mortgaged was security only:

**9. Held:** that if the husband, while receiving the wife's income, proposed to treat the wife as his debtor, the circumstances de-

### HUSBAND AND WIFE—*Continued.*

manded that he apply the income to the debt, or tell the wife he proposed to assert the rights of a surety if his property was sold.

*Nihiser v. Nihiser.* p. 460

10. *Held*: that a court of equity, in the absence of clear and satisfactory proof, that the wife did not intend her income to be applied to the payment of the debt, will not permit a husband, as surety, to hold the wife responsible, as principal; but will be regarded as reimbursed where after the creation of the relation of principal and surety, the husband receives more of her money than that for which he became surety.

*Nihiser v. Nihiser.* p. 461

IGNORANCE. See INSURANCE, 3.

INCOME OR CORPUS. See STOCK DIVIDENDS.

### INDICTMENTS.

#### 1. Statutory offenses.

Where an indictment is framed under a section of a statute, it must charge the traverser with the statutory offense created and defined by that section.

*Mulkern v. State.* p. 43

#### 2. Sufficiency of allegations: different paragraphs.

A count in an indictment had been divided into two paragraphs, and the first paragraph stated all the facts necessary in order to fully inform the traverser of the time, place, etc., of the occurrences of the acts with which he was charged. It was: *Held*, that it was not necessary to repeat those parts in the subsequent paragraph of the count, where there was no room for doubt as to what was meant.

*Simond v. State.* pp. 32-33

#### 3. Sufficiency of—.

All the essential elements necessary to constitute the offense charged must be stated in the indictment.

*Mulkern v. State.* p. 43

### INJUNCTIONS. See SPECIFIC PERFORMANCE.

#### 1. Filing papers on which equity rests.

Upon application being made for an injunction, if the plaintiff has in his possession papers or instruments in writing, upon which his equity rests, they should be filed with the bill.

*Havre de Grace v. Lewis.* p. 371

INJUNCTIONS—*Continued.***2. —; municipal ordinances.**

Where the right to relief by way of an injunction, under the facts alleged in a bill and admitted by a demurrer to be true, is not based solely upon a municipal ordinance, the mere failure to file a copy of such ordinance with the bill does not render it defective. *Havre de Grace v. Lewis.* p. 371

INSANITY. See CRIMINAL LAW, 11-12. LUNATICS.

INSTRUCTIONS. See CRIMINAL LAW, 9. PRAYERS.

## INSURANCE.

**1. Reinsurance: original company agent for others.**

An application was made to a company for fire insurance to a certain amount; the company, being unwilling to underwrite the whole risk, placed four-fifths of it with other companies, it issuing its policy for one-fifth of the amount desired, and distributing the balance in four equal amounts among four other companies; this was done without the knowledge of the assured and without any consultation with him; the agent of the original company, who had secured the business, redelivered the policies, collected the premiums and attended to the renewals; it was: *Held*, that under the circumstances such original insurance company was the agent for the others.

*Goebel v. German-American Ins. Co.* p. 427

**2. Agents: power of—; waivers of notice of vacancy.**

Such agent of the original company had once received notice that the property insured was temporarily unoccupied, and had been authorized to waive the condition providing for the avoiding of liability while the property was left vacant, unless notice in advance had been given: *Held*, that such agent had implied authority to accept notice of a vacancy, and that therefore such notice given to him was constructive notice to the original company, and therefore to the other companies.

*Goebel v. German-American Ins. Co.* pp. 425-427

**3.** An insurance company which issues a policy and collects the premiums, with actual or imputed knowledge that warranties in it are contrary to the real facts, will not be permitted to defeat recovery by the assured, on the ground that the conditions stipulated for in the policy did not in fact exist.

*Goebel v. German-American Ins. Co.* p. 424

**INSURANCE—Continued.****4. Effect on claims for damages in negligence cases.**

In an action for damages because of injury by fire, through the negligence of the defendant, evidence that the plaintiff had received insurance money from the insurance he carried against loss by fire, is not proper for the consideration of the jury.

*American Paving Co. v. Davis.* p. 485

**INSURANCE: ACCIDENT.****1. General clauses: special exceptions; pleading.**

Where an accident insurance policy covers the risk assumed in a general clause, with an exception in a separate clause, the pleader, relying on the general clause, need not negative the exception; but otherwise where the excepted risk is included in the general clause. *National Life Ins. Co. v. Fleming.* p. 184

**2. —; within railroad cars.**

Where an accident insurance policy insures the holder "while riding as a passenger in a place regularly provided for the transportation of passengers *within* a surface, underground or elevated railroad car," it does not cover the case of an insured who, while standing on the platform, stepped and fell from the car while it was in motion.

*National Life Ins. Co. v. Fleming.* p. 186

**3. Total disability: death.**

The provision, in an insurance policy, for payment in case of "injuries resulting in total disability," was: *Held*, owing to the conditions of the policy, to cover a case where the injuries resulted in death. *National Life Ins. Co. v. Fleming.* pp. 188-189

**4. Policies not to be extended beyond risks covered.**

A policy of accident insurance should not be extended to include risks clearly excluded from the terms of the contract.

*National Life Ins. Co. v. Fleming.* p. 186

**INSURANCE BROKERS.****1. License: who must pay.**

Section 218 of Article 23, defining who are to be deemed insurance brokers, within the meaning of the law, while not including all who may assist in making out and delivering policies, or in collecting the premiums, or giving out notices, etc., includes in that term all who, for a compensation, aid in negotiating contracts of insurance. *State v. Geddes.* p. 168

**INSURANCE BROKERS—Continued.****2. —; not mere clerk.**

A clerk, hired by a firm of licensed insurance brokers, who, under their orders, delivered a policy previously effected by the firm, and collected the premium therefor, is not acting in violation of the Act. *State v. Geddes.* p. 168

3. For such a person to go, at the behest of his employers, to the agents of other insurance companies, to effect the placing a risk, is a distinctly *clerical service*, rendered to his own employers, and not to the person seeking the insurance, and such acts are not "aiding in negotiating insurance," within the meaning of the law. *State v. Geddes.* pp. 169-170

**4. —; those who aid in obtaining business.**

But a person who, without a license, acts as the procurer or procuring cause in obtaining business for an insurance broker, and aids in negotiating insurance contracts, comes under the inhibition of the law. *State v. Geddes.* p. 169

**5. —; soliciting.**

And the soliciting and obtaining of the renewal of a policy already in force does not differ from the act of soliciting and procuring the original agreement, and a party who acts for compensation in procuring such a renewal, is an insurance broker. *State v. Geddes.* p. 170

**INSURANCE: FIRE.****1. Fireproof safe clause: effect of—.**

It was further: *Held*, that the failure to keep in a fireproof safe such inventory and the sets of books, as the policy required to be so kept, was a failure on the part of the appellant to do that which was proper for the protection not only of the insurer but of the insured. *Miller v. Home Fire Ins. Co.* p. 147

2. It was further: *Held*, that since the failure of the appellant to produce the books and records that the policy provided for, was chargeable to his own default in the performance of his contractual duty, it was a bar to his recovery under the policy. *Miller v. Home Fire Ins. Co.* p. 147

**3. Ignorance of terms of policy.**

The neglect of an insured to become familiar with the terms of the policy which he seeks to enforce, does not relieve him of

**INSURANCE: FIRE—Continued.**

the binding effect of its covenants, in the absence of any evidence impeaching its validity.

*Miller v. Home Fire Ins. Co.* p. 147

**4. Inventories.**

A policy of fire insurance required the assured to take a complete inventory of the stock on hand at least once each calendar year; and unless such an inventory had been taken within 12 months prior to the date of the policy, it was provided that one should be taken within 30 days of the issuance of the policy; the policy further required the keeping of a full and complete set of books, and also contained the "fireproof safe" clause. The appellant purchased the goods constituting the stock in trade in a certain store; and at the time of so doing made a careful and detailed inventory giving his appraised valuations; this was made a short time before he assumed control, and before he took out the policy of insurance; the insured did not keep any books, nor did he keep the inventory in a safe, as required by the policy; the fire totally destroyed the goods a month or so later.

*Held*, that such an inventory was such a one as was required by the policy; and that the insured could not recover on the theory, that he had the right to make an inventory within 30 days of the delivery of the policy.

*Miller v. Home Fire Ins. Co.* p. 144

**INTEREST.** See SALES IN EQUITY, 8.

**INVENTORY.**

An inventory is an itemized list or schedule of articles, usually including a notation of their estimated values.

*Miller v. Home Fire Ins. Co.* p. 144

**INVESTMENTS.** See ATTORNEYS-AT-LAW.

**JAIL RECORDS.** See EVIDENCE, 8.

**JUDGMENTS.****1. Errors: immaterial—; effect of—.**

A judgment will not be reversed where it appears that the ruling objected to resulted in no injury to the party excepting.

*Abromatis v. Amos.* p. 401

**JUDGMENTS—Continued.****2. Joint defendants: entirety.**

A judgment against joint defendants is an entirety.

*Frey v. McGaw.* p. 25

**3. Judgment against one only: no lien.**

But where a judgment is recovered against one only of the tenants by the entireties, no lien can attach to the interest of the judgment debtor in such property. *Frey v. McGaw.* p. 25

**4. —; against tenants by the entireties; man and wife.**

A joint judgment against a man and wife, who own real and leasehold property as tenants by the entireties, operates as a lien upon the property so held. *Frey v. McGaw.* p. 25

**5. Leasehold property.**

Under Article 26, section 19 of the Code, the entry of a judgment makes it a lien upon the defendant's leasehold as well as his real property, except in certain enumerated cases.

*Frey v. McGaw.* p. 25

**6. Levy unnecessary.**

To perfect such lien no actual levy is necessary.

*Frey v. McGaw.* p. 25

**7. Lien of—: bankrupt law; effect of—.**

A judgment lien entered up more than four months before a petition for adjudication in bankruptcy, is valid under the provisions of the Bankrupt Act, unless it be void for some other reason.

*Frey v. McGaw.* p. 26

**8. Satisfaction: limitation of right.**

In general, a plaintiff who has recovered a judgment is not required to look to any one piece of property rather than to another, for the purpose of enforcing and satisfying it; the only limitation of his right is, that he may have but one satisfaction.

*Frey v. McGaw.* p. 27

**JUDGMENTS: SETTING ASIDE.****Fraud.**

Wherever an issue exists in an action or proceeding, each of the parties should anticipate that the adversary will offer evidence to support his side of it, and should be prepared with counter-proof. Where he has had such opportunity and does not avail himself of it, or though availing himself of it is unable to overcome the effect of the other side's evidence, he can

### JUDGMENTS—SETTING ASIDE—*Continued.*

not obtain what, in effect, would be a new trial of the issue before another tribunal by charging that the judgment against him was procured by fraud. *Wilmer v. Placide.* p. 341

### JURISDICTION: CONCURRENT.

#### 1. Priority.

In general, when two courts have concurrent jurisdiction over the same subject-matter, the court in which the suit is first commenced is entitled to retain it, and the other co-ordinate court has no authority to interfere, and should, as soon as judicially informed of the pendency of the prior suit, dismiss the subsequent proceedings. *Whiting v. Shipley.* p. 119

#### 2. —; burden of proof.

But the party complaining against the jurisdiction exercised by one such court, upon the ground that the jurisdiction of another court had already been invoked, must adduce proof to sustain the allegation. *Whiting v. Shipley.* p. 119

### JURY: PROVINCE OF—. See CONTRACTS, 7. EVIDENCE, 15. NEGLIGENCE: ACTIONS FOR—.

#### 1. Taking case from—.

In deciding this question of taking a case from the jury, the Court should first assume the truth of all the testimony given to the jury, tending to sustain the plaintiff's right to recover, and of all inferences of fact fairly deducible therefrom; and if, upon consideration of such evidence, it is found of sufficient probative force to enable an ordinary intelligent mind to draw a rational conclusion therefrom in support of the plaintiff's right to recover, the evidence is properly submitted to the jury, by whom its weight and value is to be determined.

*Francis v. Outlaw.* p. 319

2. It is the function of the jury to pass on the weight and credibility of the testimony, and the duty of the court to state the law applicable to it. *Bluthenthal v. May Adver. Co.* p. 282

#### 3. "No evidence."

If there be no evidence upon which a rational conclusion may be based in support of the claim of the plaintiff, the case should be withdrawn from the jury.

*Culler v. Standard Oil Co.* p. 411

**JURY: PROVINCE OF—***Continued.***4. Speculation.**

Juries can not be allowed to make mere conjectures or speculations the foundations of their verdicts.

*Culler v. Standard Oil Co.* p. 411

5. Before a court can grant a prayer withdrawing a case from the consideration of the jury, on the ground of want of evidence, it must assume the truth of all the evidence tending to sustain the claim, or defense, as the case may be, and all inferences of fact, fairly deducible from it, and this although such evidence be contradicted in every particular by the opposing evidence.

*McGrath v. Peterson.* p. 414

**JURY: TRIAL BY—** See CONDEMNATION OF LAND.**Witnesses.**

Trial by jury implies the right of either party to the cause to call witnesses to support his case. *Frazier v. Leas.* p. 576

**JURYMEN: WITHDRAWAL OF ONE—****1. Discretion of court.**

Before the jury was sworn the court allowed a party to withdraw his peremptory challenge against a juror, who thereby became a qualified juror, and exercised his peremptory challenge against another juror, who had previously been accepted: *Held*, that the Court in so doing acted within its discretionary power, and as it did not appear from the record that there was any abuse of discretion, resulting in injury to the opposite party, its action constituted no ground for reversal.

*Bluthenthal v. May Adver. Co.* p. 285

2. It is not reversible error for a court of its own motion to exclude a juror, even for insufficient cause, if an unobjectionable jury is afterwards obtained.

*Bluthenthal v. May Adver. Co.* p. 285

**LACHES.**

Equity does not countenance laches or long delays, and will refuse to interfere in favor of a party guilty of laches or unreasonable acquiescence in the assertion of stale demands.

*Henderson v. Harper.* p. 433

## LANDLORD AND TENANT.

### Use and occupation.

Ordinarily, as between persons in the relation of landlord and tenant, the regular payment by the one, and the acceptance by the other, of money for an occupation implies some kind of tenancy. *Postal Telegraph Co. v. State Roads Comm.* p. 248

## LEASES: CONSTRUCTION OF—.

### 1. Electric current.

Provisions in a lease that the landlord should furnish the tenant with electric current at a certain rate; that the tenant should take all the current that he shall use in conducting his business, from the landlord; and that the tenant would not do anything in or about the premises to controvert or affect the insurance thereon; *Held*, that such provisions do not obligate the tenant to use any electric current nor hinder him from installing and using a gas engine as its source of power for conducting his business. *Phoenix Pad Co. v. Roth.* p. 544

### 2. Land as well as building.

In general, a lease of a building carries with it the land upon which the building stands. *Brager v. Bigham.* p. 156

### 3. Redemption statutes.

The redemption statutes, codified in Article 53, section 24, and Article 21, section 93, relating to the right of redemption of leases, relate to buildings as well as to land.

*Brager v. Bigham.* pp. 155-156

### 4. They are remedial, and are to be liberally construed.

*Brager v. Bigham.* p. 158

### 5. These rights of redemption were given for the benefit of the public, and not out of special consideration for the parties to the lease.

*Brager v. Bigham.* p. 160

### 6. Statutory right.

The right of redemption of leases, to which the law applies, for a sum of money equal to the capitalization of the rent reserved at a rate not exceeding six per centum, is a statutory right, and in legal contemplation the lease must be read as if this right were incorporated in it, and as if the parties had contracted with regard to such provision. *Brager v. Bigham.* p. 160

### 7. —; date from which right is computed.

Where section 24 of Article 53 of the Code gives the right to redeem any lease for a longer period than 15 years, at any

**LEASES: CONSTRUCTION OF—***Continued.*

time after the expiration of five years *from date of such lease*, the time for redemption is to be reckoned from the *date* of the lease, and not from the commencement of the term.

*Brager v. Bigham.* p. 160

**8. Act of 1884, chapter 485.**

Chapter 485 of the Acts of 1884 (included in section 92 of Article 21, and section 24 of Article 53 of the Code), relating to the redemption of leases, were passed for the purpose of breaking up long, irredeemable leases, rather than for any special consideration for the lessees.

*Walker v. Washington Grove Assn.* p. 568

**9. —; remedial.**

The Act is remedial in its character, and is to be liberally construed, so as to advance the remedy and suppress or prevent the mischief against which it was directed.

*Walker v. Washington Grove Assn.* p. 568

**10. Baltimore City.**

While the statute was passed more particularly with reference to Baltimore City, it is by its terms applicable to the whole State.

*Walker v. Washington Grove Assn.* p. 568

**11. Camp-meeting lots: indefinite rental.**

But the statute has no application to the lots of a Camp Meeting Association, which are leased for rentals of indefinite and variable value, which do not admit of exact capitalization, according to the terms of the Act.

*Walker v. Washington Grove Assn.* p. 569

**12. —; business leases; acts of 1914, chapter 371.**

Chapter 371 of the Acts of 1914, affecting the right to redeem *business* leases, has no application to leases created before the Act went into effect.

*Brager v. Bigham.* p. 159

**13. —; vested rights.**

In such a case the right of redemption was in the nature of a contract, and the vested right can not be defeated by legislation subsequent to the lease.

*Brager v. Bigham.* p. 159

**LIENS.** See JUDGMENTS. MECHANICS' LIEN.

## LIFE INSURANCE.

### 1. Beneficiary's interest.

In the case of ordinary life insurance, the beneficiary has a vested interest from the time the contract is entered into, unless the policy provides for a change of beneficiary by the insured.

*Rosman v. Travellers' Ins. Co. of Hartford.* p. 693

2. But where the rights of the beneficiary depend upon the will of the assured, the beneficiary can acquire no vested right under the policy before the death of the assured (unless the policy, while in the beneficiary's favor, matures otherwise).

*Rosman v. Travellers' Ins. Co. of Hartford.* p. 693

### 3. Declarations of insured.

Where the beneficiary has no vested interest, declarations of the insured made against his interest are admissible in evidence in a suit on the policy.

*Rosman v. Travellers' Ins. Co. of Hartford.* p. 693

### 4. Suicide.

An insurance policy contained a clause excepting the company from liability in case of the death of the insured by suicide; it also contained the provision that the consent of the beneficiary was not necessary for any assignment of the policy or change of beneficiary; the insured died as the result of poison that he confessed he had administered to himself, with suicidal intent: *Held*, that his confession was admissible in evidence in a suit upon the policy brought by the beneficiary.

*Rosman v. Travellers' Ins. Co. of Hartford.* p. 694

## LIMITATIONS.

### Fraud: effect of—.

The statute suspending the running of limitations when the plaintiff has been kept in ignorance of his cause of action by the defendant's fraud, does not apply against a partner who has been guilty of no fraud or wrongdoing in the transaction.

*Tippett v. Myers.* p. 532

## LIQUOR LAWS.

### Acts of 1908: "place of business."

In order to be able to convict a traverser for the sale or giving away of liquor in violation of section 10 of Chapter 179 of the Acts of 1908, it must be alleged in the indictment that the liquor was sold or given away "at the traverser's" *place of business*.

*Mulkern v. State.* p. 44

**LUNATICS.****1. Care of—: in Allegany County; State's liability; chapter 778 of Acts of 1914.**

The amount of the State's liability, under Chapter 778 of the Acts of 1914, for the support of dependent insane at Sylvan Retreat is the *deficiency* between the amount paid by Allegany County and other counties of Maryland, and the actual cost of supporting and maintaining such persons.

*Allegany Co. v. State Lunacy Comm.* p. 165

**2.** The State's liability is not limited by the Act only to the deficiency arising from the care of dependent insane sent there by other counties than Allegany County.

*Allegany Co. v. State Lunacy Comm.* p. 165

**MALICIOUS PROSECUTION.**

**1.** In order to maintain an action of malicious prosecution, the plaintiff must prove affirmatively that he has been prosecuted, or that a prosecution has been instituted by the defendant or one of them; that such prosecution has terminated in his acquittal or exoneration from such charge, and that the prosecution was malicious and without probable cause. *Fait v. Bannon.* p. 698

**2. Malice.**

Malice in such cases may be presumed upon the establishment of the want of probable cause; and the burden of proof is then upon the defendant to show such facts as will warrant a jury in finding that he was not actuated by malice.

*Fait v. Bannon.* p. 698

**3.** "Malice" in such actions is not to be considered as spite or hatred against the individual, but that the party is actuated by improper or indirect motives. *Fait v. Bannon.* p. 698

**4. Advice of counsel.**

For the advice of counsel to serve as a defense to an action of malicious prosecution, it must appear that all the material facts in the possession of the defendant were fully and fairly made known to the counsel.

*Fait v. Bannon.* p. 698

**MANDAMUS.** See BUILDING PERMITS.

**MARKETS.** See MUNICIPAL CORPORATIONS, 1.

**MAXIMS.**

**Interest publicae ut finis sit litium.**

Public policy demands that there should be an end of litigation.

*Wilmer v. Placide.* p. 341

**MOTIVES.** See **SUICIDE.**

**MOTIONS TO QUASH.****Appeals.**

The ruling of a court on a motion to quash can not be reviewed on appeal, unless the facts upon which the motion was based are set out in the record by agreed statement or special finding of the court.

*Hamilton v. State.* p. 314

**MECHANICS' LIEN.****1. Sales of material to contractor: when no lien.**

The owners of a lot of ground contracted with a builder to erect for them a building upon the lot; the builder contracted with R. & L. for all the stone to be used on the structure; a month after the last of the stone had been delivered, the owners took possession of the uncompleted building and finished the same, making use for that purpose of the unused stone left upon the premises; notice to claim a lien under the Mechanics' Lien Law had been made upon the owners by the material man, within the time prescribed by the statute: *Held*, that there was an absolute sale and delivery of the stone to the contractor, and that regarding such purchase the contractor could not be considered as the agent of the owners.

*Richardson v. Saltz.* p. 392

**2.** The fact that the owners took possession of the unfinished building and the unused stone did not change the relation of the parties, in so far as the Mechanics' Lien Law was concerned.

*Richardson v. Saltz.* p. 392

**3. Owner: when rights against—.**

The material man's right to compensation from the owners depended upon their perfecting their lien according to the mandate of the statute.

*Richardson v. Saltz.* p. 392

**4.** A letter from the material man to the owners, written sixty days after the last delivery of the stone, notifying them that the material man had furnished the stone, and requesting payment of the same, to which letter the owners never replied, did not bring the material man within the protection of the Mechanics' Lien Law.

*Richardson v. Saltz.* p. 392

**MECHANICS' LIEN**—*Continued.*

5. The failure of the owners to reply to the letter did not amount to an implied promise to pay.

*Richardson v. Saltz.* p. 392

6. Notice.

The principle that the notice, required under section 11 of Article 63 of the Code, is unnecessary where the owner is also the builder, as decided in former cases, has no application where an owner becomes the builder, without having been the original purchaser of the materials, either directly or by agent.

*Richardson v. Saltz.* p. 393

**MORTGAGES.** See **TAXATION.**

1. **Payment: presumption.**

The presumption of payment in favor of a mortgagor in possession for over 20 years is not conclusive. *Cacy v. Slay.* p. 497

2. —; **positive relief; burden of proof.**

When relief is sought by a bill in equity to compel the release of a mortgage, on the ground of payment, an *allegation* of payment is insufficient, and must be supported by proof.

*Cacy v. Slay.* p. 498

3. On appeal from a decree refusing to direct the execution of a release of a mortgage, alleged to have been long overdue, etc., the cause was remanded, under section 38 of Article 5 of the Code, without reversing or affirming the decree, for further proceedings; it being: *Held*, that there was not sufficient evidence to justify action on the bill.

*Cacy v. Slay.* p. 501

4. **Payment: presumption; mortgage notes.**

Section 25 of Article 66 of the Code, providing that the recorded release of a mortgage shall cause it to be conclusively presumed that the notes secured thereby are paid, so far as any lien on the property is concerned, is not retroactive.

*Cacy v. Slay.* p. 499

**MUNICIPAL CORPORATIONS.** See **BALTIMORE CITY.**

**CONSTITUTIONAL LAW. 2. FAIRNESS: DUTY OF MUNICIPALITIES** (see Constitutional Law, 2). **INJUNCTIONS.**

1. **Streets and markets.**

It is the duty of a municipality to keep the approaches to the public markets, as well as its streets and highways, in a safe condition for public travel. *Burke v. Baltimore City.* p. 562

MUNICIPAL CORPORATIONS—*Continued.***2. —; negligence.**

If Baltimore City negligently fails to do so, and persons, acting without negligence, are injured, the city is liable in damages for the injuries caused by its neglect.

*Burke v. Baltimore City.* p. 562

## NEGLIGENCE: ACTIONS FOR—. See BALTIMORE CITY, 2. DYNAMITE.

**1. Burden of proof.**

A party charging negligence as the ground of action must prove it.

*Culler v. Standard Oil Co.* p. 411

**2.** In actions for damages resulting to the plaintiff for injuries sustained by the negligence of the defendant, or of the defendant's agents, the burden rests upon the plaintiff to prove the negligence or want of care causing the accident.

*Westerman v. United Rwy. Co.* p. 227

**3. Children: "due care."**

In an action for damages for the death of a child, who was killed by a collision between the electric car of the defendant corporation and the motor truck in which the child was riding, it was: *Held*, that the expression, "due care of the person accompanying" the child, was not rendered erroneous for vagueness by the fact that both the child's grandfather and the chauffeur were in the motor truck with him, when one of the defendant's prayers had been granted leaving to the jury the fact that the child was riding on the truck "in company with the chauffeur."

*United Rwy. Co. v. Mantik.* p. 204

**4. —; contributory negligence.**

But if the evidence that the want of ordinary care or prudence on the part of the plaintiff contributed to produce the accident, there can be no recovery, unless there is evidence that the defendant, by the exercise of care and prudence, might have avoided the consequences of the plaintiff's negligence.

*Westerman v. United Rwy. Co.* p. 227

**5. Contributory: province of jury.**

When the nature of the act relied on to show contributory negligence can be determined only by a consideration of all the circumstances attending the transaction, it is within the province of the jury to characterize, and it should be left to their determination.

*National Life Ins. Co. v. Fleming.* p. 183

**NEGLIGENCE: ACTIONS FOR—Continued.**

6. Where there is some evidence of negligence both on the part of the plaintiff and of the defendant, the question of primary and contributory negligence is properly left for the consideration of the jury. *United Rwys. Co. v. Mantik.* p. 201

**7. Contributory negligence.**

But if the evidence that the want of ordinary care or prudence on the part of the plaintiff contributed to produce the accident, there can be no recovery, unless there is evidence that the defendant, by the exercise of care and prudence, might have avoided the consequences of the plaintiff's negligence.

*Westerman v. United Rwys. Co.* p. 227

**8. Court and jury: province of—.**

In negligence cases, it is the duty of the court to decide, as a preliminary legal question, whether there be any evidence legally sufficient to be considered by the jury; and the criterion is whether the evidence of the plaintiff is of sufficient probative force to enable an ordinary intelligent mind to draw rational conclusions therefrom in support of the proposition advanced.

*Burke v. Baltimore City.* p. 561

9. If any evidence is competent and pertinent, its weight and value should be left to the consideration of the jury.

*Burke v. Baltimore City.* p. 561

**10. Prayers taking case from jury.**

Before the court can grant a prayer taking the case away from the jury, it must assume the truth of all the evidence tending to sustain the claim or defense, as the case may be, and all inferences of fact fairly deducible therefrom.

*Burke v. Baltimore City.* p. 561

**11. Negligence may be inferred.**

Direct proof of negligence is not necessary, but, like other facts, may be established by proof of circumstances from which its existence may be inferred.

*Burke v. Baltimore City.* p. 563

**12. Death: as result of—; pecuniary losses only.**

In an action for damages for injuries resulting in death, brought under Article 67 of the Code, recovery is limited to the pecuniary losses sustained by the plaintiff as the result of such death.

*United Railways Co. v. Mantik.* p. 205

**NEGLIGENCE: ACTIONS FOR—Continued.****13. —; child's services.**

In an action of that character for the death of a child, evidence may be given that the parents had younger children, for whom the child that was killed used to assist in caring.

*United Railways Co. v. Mantik.* p. 205

**14. Electric cars: speed of—.**

In an action of damages against a railway company for injuries caused by a collision by one of its cars, evidence of the high rate of speed of the car at the time is admissible.

*United Railways Co. v. Mantik.* p. 205

**15. Electric cars: failure to ring bell; when immaterial.**

Where a plaintiff, injured by a collision with an electric car, saw the car approaching the crossing in time not to have gone upon the track, the fact that the agents of the defendant failed to ring any bell while approaching the crossing is immaterial.

*Westerman v. United Rwy. Co.* p. 230

**16. Freight elevator: no evidence.**

The uncontradicted evidence showed that a decedent, an adult, had been properly instructed (by his employer) how to run the employer's freight elevator, which was of standard make and in good working order, and showed that the decedent had used it a number of times, and had stated, "that he thoroughly understood the operation of it"; he was found one day killed, in the elevator, which had dropped; no one saw the accident, and there was no evidence, direct or otherwise, as to its cause, or as to how it was produced: *Held*, that a prayer withdrawing the case from the jury was correct.

*Culler v. Standard Oil Co.* p. 410

**17. Railroad tracks.**

Well defined and imperative duties are imposed upon persons before they attempt to cross the tracks of a railroad company.

*Cullen v. N. Y., P. & Norfolk R. R. Co.* p. 655

**18. —; duty of person about to cross.**

One about to cross the tracks of a railroad is bound, under all circumstances, to look and listen for approaching trains, and if the crossing is one of more than ordinary danger, and the view of the tracks is obstructed, at or near the place of crossing, it is the duty of the traveler to *stop, look and listen*, before he attempts to cross.

*Cullen v. N. Y., P. & Norfolk R. R. Co.* p. 655

NEGLIGENCE: ACTIONS FOR—*Continued.*

19. If a person neglects these necessary precautions, and in consequence of such neglect is injured by collision with a passing train, he will be held to have contributed by his own negligence to the occurrence of the accident, and is thereby precluded from recovering for such injury.

*Cullen v. N. Y., P. & Norfolk R. R. Co.* p. 655

20. A person, approaching a railroad crossing on a bicycle, while the tracks were partially concealed by standing cars, and, not heeding the ringing of the bell of an approaching train, continued his way, without pausing or stopping to look or listen, and was run into and killed: *Held*, there could be no recovery against the railroad company.

*Cullen v. N. Y., P. & Norfolk R. R. Co.* pp. 657-659

21. A party in full possession of his faculties who, for a distance of even 40 feet, has an unobstructed view of an approaching railroad engine, before he reached the place on the tracks where he was struck by the engine, and who if he had paused and looked before attempting to cross the tracks, would have avoided the accident, is guilty of contributory negligence as a matter of law.

*State v. N. Y., P. & Norfolk R. R. Co.* p. 677

22. —; duty of engineer.

When the engineer of a railroad engine sees a person approaching a railroad crossing, he has the right to assume that he will stop in a place of safety, and not attempt to cross in front of the approaching engine.

*State v. N. Y., P. & Norfolk R. R. Co.* p. 679

23. In such a case where there is no evidence that the engineer neglected any precautions to avoid the accident, after he discovered the dangerous position of such party, a prayer taking the case from the jury is properly granted.

*State v. N. Y., P. & Norfolk R. R. Co.* p. 680

24. Railroad tracks: person on—; duty of engineer.

Where there is no evidence to show that the employees of a railroad company had seen the position of danger in which a person, on or about to cross the tracks, had negligently placed himself, the plaintiffs suing the railroad company for damages for the death of such party, can not invoke the doctrine that, in spite of the contributory negligence of the party, the defendant company was liable.

*Cullen v. N. Y., P. & Norfolk R. R. Co.* p. 659

## NEGLIGENCE: ACTIONS FOR—*Continued.*

### 25. Stationary engine: damages from sparks.

In an action for damages for the injury done the plaintiff by the negligence of the defendant in its operation of an engine used in grading a road, near the plaintiff's dwelling, there need be no exact allegation as to the exact character of negligence complained of. *American Paving Co. v. Davis.* p. 481

26. The rule for the care to be used in such cases is that it must be commensurate with the risk or hazard involved.

*American Paving Co. v. Davis.* p. 481

27. The mere fact that after the fire the defendant used a spark arrester on the engine is not admissible in evidence, as a confession of liability. *American Paving Co. v. Davis.* p. 481

## NEW TRIALS.

### Discretion of court: no appeal.

In general, no appeal lies to the Court of Appeals from the refusal of the lower court to grant a new trial.

*Patterson v. Baltimore City.* p. 242

## ORDINANCE OF MAYOR AND CITY COUNCIL.

No. 44—(Approved March 28, 1859).—Laying tracks on certain streets in Baltimore. p. 662

No. 9—(Approved December 9, 1897).—Street railways to pave between tracks. p. 664

No. 416—(Approved December 9, 1909).—Opening 25th St. from Greenmount Ave. to Harford Ave. p. 235

No. 32—(Approved November 28, 1911).—Restricting location of certain buildings. p. 89

## ORPHANS' COURTS.

### 1. Appraisers: fitness; removal.

The fitness and qualifications of appraisers appointed by the Orphans' Court, and their impartiality and disinterestedness to act as such, are questions of fact to be determined by the Court, and if the finding is adverse to the appraisers, the Orphans' Court has power to remove them. *Wingert v. Albert.* p. 85

### 2. Presumption in favor of Orphans' Court.

There is a presumption in favor of the correctness of the findings of the Orphans' Court upon questions of fact.

*Wingert v. Albert.* p. 85

ORPHANS' COURTS—*Continued.*

## 3. Jurisdiction: concurrent applications.

Where an application had been made, to the Orphans' Court of one of the counties, for letters of administration on a decedent's estate, and application for letters on the same estate was made, on the same date, to the Orphans' Court of Baltimore City, it was: *Held*, upon appeal, that the order of the Orphans' Court of Baltimore City refusing to revoke letters actually granted by it on such application, should not be reversed, merely because of the application made to the other Court, especially when the decision of the Orphans' Court of Baltimore City, as to the residence of the deceased was correct.

*Whiting v. Shipley.* p. 119

## PARTNERS AND PARTNERSHIPS: LIMIT OF LIABILITY. See ATTORNEYS-AT-LAW.

## Pleading.

A plea not denying the partnership alleged in a declaration, admits the partnership only, and does not admit that the transaction sued on was within the partnership scope.

*Tippett v. Myers.* p. 531

## PATAPSCO RIVER. See BALTIMORE CITY.

## PAYMENT. See MORTGAGES, 1-4.

## PLEADING. See AMENDMENTS. BILL OF PARTICULARS.

EQUITABLE DEFENSES. SET-OFF AND RECOUPMENT.  
SLANDER.

## 1. Covenant: general issue.

In an action of covenant, the only general issue plea admissible is the plea of *non est factum*, and such plea puts in issue only the question of the execution of the deed; other defenses must be pleaded specially. *Waldeck Co. v. Emmart.* p. 476

## 2. —; leases.

In an action of covenant upon a lease, a declaration that states that the "plaintiff, by writing under seal, demised and let, \* \* \*, etc., and the defendant covenanted to pay, etc.," is not defective because of its not stating that the "*defendant therein covenanted.*" *Waldeck Co. v. Emmart.* pp. 475-476

**PLEADING—Continued.****3. —; money due in installments.**

Covenant is the only action proper on an agreement under seal for the payment of a sum of money in installments, where all the installments are not yet due.

*Waldeck Co. v. Emmart.* p. 475

**4. Declarations: sufficiency of—.**

All that is required of a declaration, in the way of allegations, is that it should set out such reasonable averments as will fully apprise the defendant of the nature of the charge against him, and enable him to prepare his defense.

*American Paving Co. v. Davis.* p. 481

5. The pleader is not required to set out in the declaration the evidence upon which he relies to establish his cause of action.

*American Paving Co. v. Davis.* p. 481

**6. —; written contracts.**

In an action on a written contract, whether the instrument be a deed or a simple contract, the contract need not be set out verbatim; it is sufficient if the legal effect be set out.

*Waldeck Co. v. Emmart.* p. 475

**7. Errors: waiver; agreement of counsel.**

An agreement between counsel to waive all errors of pleading precludes the question as to whether the form of action itself was technically correct.

*Postal Telegraph Co. v. State Roads Comm.* p. 254

**8. Misnomer: amendments.**

Under section 37 of Article 75 of the Code, a court has authority to allow an amendment of a name in a suit when it is satisfied that the party summoned as defendant was, in fact, the party intended to be sued, and its exercise of such authority is not subject to review on appeal. *Abromatis v. Amos.* p. 404

**9. Variance: how to be availed of.**

Before the passage of Chapter 110 of the Acts of 1914, notwithstanding the provisions of the Code, section 9 of Article 5, relating to the necessity for the raising below of questions as to prayers before the matter can be passed on by the Court of Appeals, yet if prayers referred to the pleadings, the Court was called upon to examine them, and if there was any variance between the pleadings and the proof, such reference in the pray-

**PLEADING—Continued.**

ers was deemed sufficient to permit the variance to be availed of on appeal. *Western Un. Telegraph Co. v. Bloede.* p. 352

10. Under the Act of 1914, such a variance can not be taken advantage of by a mere reference in the prayers to the pleadings; but in order to take advantage of such defect, the prayers should set out the point as to which it is claimed a variance exists by referring to that portion of the declaration which it is claimed is at variance with the evidence.

*Western Un. Telegraph Co. v. Bloede.* pp. 352-353

**PLEADING IN EQUITY. See EQUITY.****1. Appeals: adequacy of bill, etc.; exceptions necessary.**

The contention that while a plaintiff's remedy is by bill in equity, he has been given a decree which is different in character and effect from the one to which he may be entitled; or that while the bill is adequate for the purpose of an equity proceeding to secure the plaintiff's interests, it is inadequate as a basis for the particular relief decreed, is an objection within the purview of Article 5, section 36 of the Code, relating to appeals in equity; and where no exception to that effect was made and filed below, the question is not reviewable on appeal.

*Equitable Ice Co. v. Moore.* p. 324

**2. —; reservation of all lawful objections, etc.; when not sufficient.**

In such a case, a clause in the answer reserving all lawful objections to any error in the form and substance of the bill, is not sufficient to meet the requirements of that section of the Code.

*Equitable Ice Co. v. Moore.* p. 324

**3. Bill: sufficiency of—; exceptions to.**

Where no exceptions are taken to the sufficiency of a bill, it is immaterial whether or not its averments cover the case as proved, and the court must decree according to the evidence.

*Equitable Ice Co. v. Moore.* p. 326

**4. Filing of bill and exhibits, etc.**

Under General Equity Rule No. 4, no order or process will be made or issued on any bill, etc., until each bill, etc., together with all the exhibits referred to as parts thereof, be actually filed with the clerk.

*Henderson v. Harper.* p. 432

5. Where a bill in equity is filed for the purpose of charging the lands of a decedent with the payment of certain sums of money

**PLEADING IN EQUITY—Continued.**

alleged to be distributable to his children as legatees under his will, which is referred to in the bill, the will of the testator is a necessary part of the bill and should be filed therewith.

*Henderson v. Harper.* p. 432

**6. Non-joinder of parties.**

The non-joinder or defense of the want of necessary parties, when apparent on the face of a bill, may be availed of by demurrer to the bill.

*Henderson v. Harper.* p. 432

**POLICE POWER. See BALTIMORE CITY.**

**1. Building regulations.**

The authority to enact and enforce building regulations rests on the ground that it is a part of the police power.

*Stubbs v. Scott.* p. 90

**4. Refusal of permit.**

An application for a building permit, for the erection of a store building, for general business purposes, can not be legally refused, merely because there are no other stores in the block, and because the other buildings were fine and costly dwellings.

*Stubbs v. Scott.* p. 90

**PRACTICE. See ADDRESS TO JURY. ATTACHMENT. BALTIMORE PRACTICE ACT. CRIMINAL LAW. EXCEPTIONS. MOTIONS TO QUASH. NEW TRIALS. PRAYERS. PROCESS.**

**1. Process: summons; diligence.**

In general, when the plaintiff leaves a break in the proceedings, as by not continuing the process regularly from day to day, or from term to term, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend.

*Washington & Rockville Rwy. Co. v. Johnson.* p. 222

**2. —; sufficiency of—.**

But this rule should not be applied, where the plaintiff has a right to have a judicial determination as to whether or not he had succeeded in bringing the defendant into court, before ordering any writ.

*Washington & Rockville Rwy. Co. v. Johnson.* p. 224

**PRAYERS.** See **APPEALS**, 3.**1. Abstractions of law.**

Prayers that submit to the jury mere abstractions of law are erroneous and should be refused.

*Patterson v. Baltimore City.* p. 240

2. Prayers that are mere abstractions of law are improper, although the principles they announce may be correct.

*Fait v. Bannon.* p. 698

**3. Legal abstractions: are erroneous.**

Prayers that submit to the jury mere abstractions of law are erroneous and should be refused.

*Patterson v. Baltimore City.* p. 240

**4. Concluding with right of either party to recover.**

A prayer concluding with the right of either party to recover must submit the whole case, and the conclusion reached upon the facts must be correct notwithstanding all other facts and circumstances in evidence.

*Bluthenthal v. May Adver. Co.* p. 284

**5. Objections to granted prayers.**

An objection to a granted prayer can not be considered on appeal, unless a special exception, relying upon the alleged defect in the prayer, appears by the record to have been taken below.

*Stewart Taxi-Service Co. v. Roy.* p. 79

**6. Unsupported by facts.**

Prayers which are inappropriate to the proven facts are properly rejected.

*United Rwys. Co. v. Mantik.* p. 203

**7. Unsupported by evidence.**

Prayers unsupported by any evidence in the case are properly refused.

*Bluthenthal v. May Adver. Co.* p. 283

**8. Should refer to the facts.**

Every prayer should be framed with reference to the facts of the particular case.

*Coppage v. Howard.* p. 525

**9. Misleading.**

Prayers calculated to mislead the jury are improper.

*Coppage v. Howard.* p. 525

**10. Withdrawing case from jury: duty of court.**

In passing upon the question whether a case should be withdrawn from the consideration of the jury, the court need only consider the plaintiff's testimony, even though it should be

### PRAYERS—*Continued.*

in conflict with that of the defendant; it being assumed, on such questions, that the plaintiff's evidence, tending to sustain his right to recover, is true. *Parker v. Power.* pp. 605-606

#### 11. —; sufficiency of evidence.

The test to be applied in determining the legal sufficiency of such evidence is whether it is of sufficient probative force to enable an ordinary intelligent mind to draw a rational conclusion therefrom in support of the plaintiff's right.

*Parker v. Power.* p. 606

### PRESUMPTIONS—See COURTS.

PRINCIPAL AND AGENT. See AGENTS. AGENCY.  
BROKERS.

### PRINCIPAL AND SURETY.

#### 1. Equitable rights of—.

Evidence is always admissible to show the equitable rights of the principal and surety toward each other, if material to the right to recover the amount paid by the surety; and as between the immediate parties, to show their true relation in fact, although different from that indicated by the instrument or their relative positions thereon. *Nihiser v. Nihiser.* p. 459

#### 2. Indemnity by principal.

The implied obligation of the principal to indemnify his surety springs up at the time the relation is entered into, and is consummated when the surety has paid the debt, but the principal can show that he has reimbursed his surety.

*Nihiser v. Nihiser.* p. 459

#### 3. Mortgage for debt of another.

When property is pledged or mortgaged by the owner to secure the debt of another person, such property occupies the position of a surety.

*Nihiser v. Nihiser.* p. 459

### PROBABLE CAUSE.

#### 1. Question of law and of fact.

The want of probable cause is a mixed question of law and fact.

*Fait v. Bannon.* p. 698

2. What will amount to want of probable cause is a question of law for the court; and the existence of the facts relied upon as evidence of such want of probable cause in any particular case, is a question for the jury.

*Fait v. Bannon.* p. 698

PROCESS. See CORPORATIONS, 1, 2. CORPORATIONS:  
FOREIGN.

RAILROADS. See NEGLIGENCE. STREET RAILWAY CO.

1. Crossings: contracts in regard to—; breach; damages.

A contract between the owner of a tract of land and an electric railway company provided that the latter should construct railway crossings along the right of way through the property; in a suit for damages for breach of that contract, it was: *Held*, that in such a suit it was proper to consider the adaptability of the land to development for suburban residences, and as evidence of such contemplated development it was: *Held*, that the number of crossings might be considered, as tending to show that they were not intended as farm crossings merely.

*W., B. & A. Electric Rwy. Co. v. Linthicum.* p. 267

2. In such cases compensation is not to be estimated simply with reference to the value of the land to the owner, in the way in which he maintained it, but consideration should be given to its value in view of the uses to which it was reasonably capable of being put. *W., B. & A. Electric Rwy. Co. v. Linthicum.* p. 268

RECOUPMENT. See SET-OFF, ETC.

RENT: VALUE. See LANDLORD AND TENANT.

In general, a party who has not seen a certain property for 20 years is not competent to certify as to its rental value.

*Abromatis v. Amos.* p. 401

RES ADJUDICATA.

Estoppel: how may be availed of.

A verdict and judgment upon the merits in a former suit, is in a subsequent suit between the same parties, where the cause of action, damages or demand is the same, conclusive against the plaintiff's right to recover, whether pleaded in bar or given in evidence under the general issue, and such prior verdict and judgment need not be pleaded by way of estoppel.

*Impervious Products Co. v. Gray.* pp. 68-69

ROADS. See STATE ROADS.

ROAD LAWS.

1. Ellicott City: division with county.

The natural meaning of the words, "taxes levied and collected for road purposes," in the connection in which they are used in Chapter 836 of the Acts of 1914, in the revised charter

**ROAD LAWS—Continued.**

of Ellicott City, is the taxes to be expended in the maintenance and construction of the public roads; the language has reference to taxes levied for the future construction and maintenance of the roads. *Ellicott City v. Howard County.* p. 583

2. The provisions in the Act of 1914 relating to the division of the Howard County road taxes between County Commissioners of Howard County and the Commissioners of Ellicott City, do not relate to such taxes raised for the repair of roads that had been made before the Act went into effect.

*Ellicott City v. Howard County.* p. 584

**3. Road superintendent.**

While the salary of the Road Superintendent is money expended for road purposes, the Commissioners of Ellicott City are not entitled to any part of it under the above provisions of the Act of 1914. *Ellicott City v. Howard County.* pp. 582-583

**SALES IN EQUITY.****1. Inadequacy of price.**

Mere inadequacy of price is not sufficient to vacate a sale in equity, unless it be so gross and inordinate as to indicate some mistake or unfairness for which the purchaser is responsible, or some misconduct or fraud on the part of the trustee making the sale.

*Boyd v. Smith.* p. 364

2. Such sales should not be set aside merely because of allegations that offers are made to submit a bid in excess, or somewhat in excess, of the price of the sale reported.

*Boyd v. Smith.* p. 365

3. To set aside such a sale and order a resale of the property upon such offers or bids would be an experiment only, and should not be allowed.

*Boyd v. Smith.* p. 366

4. It would be a dangerous and unsafe practice and one not to be tolerated, to reject sales so made and reported, merely to let in other and higher bidders, when no fraud, misrepresentation, or unfairness is shown, by inadequacy of price or otherwise.

*Boyd v. Smith.* p. 366

5. Where upon exceptions to a trustee's sale it is alleged that particular parties are willing to pay a definite, increased price for the property, and the purchaser at the sale agreed, before the ratification, that his bid for the property should be increased to a sum somewhat larger than that amount, and the report of

**SALES IN EQUITY—Continued.**

the sale was so corrected, and a new order *nisi* passed, then in passing upon the exceptions to the sale, the comparison should be with the corrected price, and not with the original bid.

*Boyd v. Smith.* p. 365

**6. Parties: remote interest.**

In proceedings for the ratification of a trustee's sale, it is not necessary that all persons be made parties who by any remote possibility might have some claim against the property.

*Stewart v. Kreuzer.* p. 10

**7. Title: adversary possession.**

A purchaser can not be heard to object to completing a contract for the sale of property, upon the mere ground that title depends on adversary possession.

*Stewart v. Kreuzer.* pp. 9-10

**8. Ratification: interest.**

At a trustee's sale the contract provided that the balance of the purchase money would become due upon a ratification of the sale by the court; there was considerable delay before the sale was in fact ratified; but as the delay did not appear to have been caused solely by the purchaser, it was: *Held*, that he should be charged with interest only from the day of ratification, and not from the day of sale.

*Stewart v. Kreuzer.* p. 11

**SALE OF GOODS.****Warranty.**

Under the Uniform Sales Act, where, upon a breach of warranty of goods sold, if the plaintiff resorts to one of the distinct courses therein provided for, no other remedy is thereafter to be granted him.

*Impervious Products Co. v. Gray.* p. 69

**SERVICE: ACCEPTANCE OF—** See CORPORATIONS, 2.  
**DECEDENTS' ESTATES.**

**SET-OFF AND RECOUPMENT.**

1. The plea of set-off is of purely statutory creation and is limited to *mutual debts*, of the same kind or quality, and which are certain, and clearly ascertained, or liquidated.

*Impervious Products Co. v. Gray.* p. 67

**SET-OFF AND RECOUPMENT—Continued.**

2. In an action of assumpsit, the defendant, under the general issue plea, may show injury to him by the plaintiff, on which to found claim for recoupment.

*Impervious Products Co. v. Gray.* p. 67

3. Under the statute, under a plea of set-off, a defendant who has proved the items or accounts which go to establish the plea, may recover a judgment against the plaintiff for any sum that the proof shows the plaintiff owes him, over and above the amount of plaintiff's claim.

*Impervious Products Co. v. Gray.* pp. 67-68

4. But in recoupment, while the defendant may show damages, equal to the whole or part of the plaintiff's claim, and have it deducted therefrom, he can not recover any affirmative judgment against the plaintiff. *Impervious Products Co. v. Gray.* p. 68

**SLANDER.****1. Damages: feelings.**

In an action of slander, the plaintiff may properly testify as to the effect upon his feelings of the defamatory words.

*Bavington v. Robinson.* p. 48

**2. Evidence: good faith.**

In an action of slander, where the plaintiff has already testified to his innocence and good faith, in the matter concerning which the slanderous charge was made, it is not reversible error to exclude his further testimony negating the imputation of criminality.

*Bavington v. Robinson.* p. 49

**3. Justification: plea of—; to separate charges.**

In an action of slander the defendant may justify as to one or more of the separate charges.

*Bavington v. Robinson.* p. 48

4. A plea of justification can not be required to apply to words which the defendant denies having spoken.

*Bavington v. Robinson.* p. 48

**5. —; rebuttal; reputation.**

In an action of slander, where the words charged impute crime, and are sought to be justified by pleading and proof, the plaintiff should be allowed in rebuttal to prove his good reputation with respect to the element of character affected by the defamation.

*Bavington v. Robinson.* p. 52

**SLANDER—Continued.****6. Privilege and express malice.**

Even where a statement may be privileged, it may be the basis for a recovery of damages in an action of slander, if defendant, in making it, was actuated by express malice.

*Bavington v. Robinson.* p. 53

**SPECIFIC PERFORMANCE.**

1. For the specific performance of a contract to be decreed, the contract must be definite and certain in all its terms, and must be free from all shade or color of ambiguity.

*Phoenix Pad Co. v. Roth.* p. 543

2. It must be so clearly proven as to satisfy the court that it constitutes the actual agreement between the parties.

*Phoenix Pad Co. v. Roth.* p. 543

**3. Perpetual injunction.**

All the principles applied to a bill for specific performance apply to the case of a bill for perpetual injunction, when that injunction accomplishes all the objects which could be accomplished by a successful prosecution of a formal bill for specific execution.

*Phoenix Pad Co. v. Roth.* p. 543

**4. Threat of contest.**

The mere threat or possibility of a contest will not be sufficient to induce a court to refuse a specific performance of a contract of sale; to justify such refusal, the doubt must be a rational one, and one which would induce a prudent man to hesitate about the title.

*Stewart v. Kreuzer.* p. 11

**SPECULATION.** See ATTORNEYS-AT-LAW. JURY: PROVINCE OF—, 4.

**SPENDTHRIFT TRUSTS.** See ATTACHMENT, 1.

**STATE'S EVIDENCE.**

The mere fact of turning State's evidence, and testifying in the case against others charged as co-conspirators, does not operate as a grant of immunity to a traverser indicted for conspiracy.

*Simond v. State.* pp. 33-34

**STATE ROADS.****1. Compensation for special use: right of State.**

When the State is entitled to money for the use and occupation of public roads, it is proper for the suit therefor to be brought by the State Roads Commission.

*Postal Telegraph Co. v. State Roads Comm.* p. 249

STATE ROADS—*Continued.*

2. The Act of Congress empowering telegraph companies to use post roads does not give telegraph companies the right to make special use of a States' property in its roads, etc., without compensation. *Postal Telegraph Co. v. State Roads Comm.* p. 251

3. A telegraph company for a number of years had been making a special use of a certain bridge, owned by a private corporation, and had been paying to the said corporation a certain annual sum therefor, how arrived at or under what arrangement was not shown; the State Roads Commission acquired the bridge from the corporation, with all its interests and rights therein, to be used as part of the State Roads System; in a suit by the State Roads Commission against the telegraph company for the use of the bridge, it was: *Held*, that the State was entitled to receive compensation for the special use; and that the former sum paid by the telegraph company might be considered as evidence of what was the value of such special use.

*Postal Telegraph Co. v. State Roads Comm.* p. 255

STATIONARY ENGINE. See NEGLIGENCE: ACTIONS FOR—, 25.

STATUTES. See ACTS OF ASSEMBLY.

1. **Prospective, when possible.**

Statutes are not to be given a retroactive effect unless the words used are so clear, strong and imperative that no other meaning can be given them, or unless the intention of the Legislature could not be otherwise satisfied.

*Ellicott City v. Howard County.* p. 584

2. **Intention.**

In construing statutes, the intention of the Legislature, as expressed in the words of the Act, must be ascertained and given effect.

*Frazier v. Leas.* p. 575

3. **Language of Act.**

The language of the Act is its most natural expositor, and where the language is susceptible of a sensible interpretation, it is not to be controlled by any extraneous considerations.

*Frazier v. Leas.* p. 575

4. **Private right to be favored.**

The construction must be liberal in favor of private right, and any construction which imputes an intention to deny valuable rights is to be avoided.

*Frazier v. Leas.* p. 575

STATUTES—*Continued.*

## 5. Recognition of constitutional rights.

Statutes are presumed to have been passed in full recognition of the constitutional rights of citizens.

*Frazier v. Leas.* p. 575

## 6. Enactment of—: amendment; striking out all after “A Bill.”

The amendment of a bill, by striking out all after the words “A Bill,” and substituting or inserting in lieu thereof an entire new bill, is in accordance with universal legislative procedure, and is not in conflict with section 27 of Article 3 of the Constitution.

*Thrift v. Towers.* p. 58

## 7. Authenticity of bills: impeachment of—.

When a bill is properly authenticated, it can not be impeached by the Journals alone, or by oral testimony that some provision of the Constitution was not observed in its passage.

*Thrift v. Towers.* p. 61

## 8. —; title of bill endorsed on back.

There is no constitutional provision requiring the title of a bill to be endorsed upon the back of a bill; and where the *original* title of a bill was endorsed upon the back of a new bill, which by amendment had been substituted for the original bill, this is not sufficient to authorize the presumption that in the reading of the bill as it was in process of being passed by the Legislature, the proper title was not read.

*Thrift v. Towers.* p. 60

## 9. Interpretation: intent.

In the interpretation of statutes, courts must endeavor to ascertain the intention of the Legislature, and this intention may be gathered not merely from the language of its enactments, but also from the causes which occasioned their passage, and from the surrounding circumstances existing at the time.

*Allegany County v. State Lunacy Comm.* p. 162

10. The real intent, when ascertained, will always prevail over the literal sense of the language used.

*Brenner v. Brenner.* p. 193

## 11. Whole Act to be considered.

The cardinal rule in the construction of statutes is to ascertain the legislative intent, as expressed in the words of the statute; and for this purpose the whole Act must be construed together.

*Brenner v. Brenner.* p. 193

## STATUTES—*Continued.*

### 12. Remedial statutes.

Remedial statutes are to be liberally construed.

*Brager v. Bigham.* p. 158

## STOCK DIVIDENDS.

### 1. Income or corpus.

When stock dividends are declared in a testator's lifetime, the stock so acquired normally constitutes a part of the corpus of the estate passing under the will, the same as the original stock on account of which it was issued.

*Miller v. Safe Dep. & Tr. Co.* pp. 614-615

2. The reason for appropriating, to the corpus of a trust estate, the proportion of a stock dividend earned, though not distributed, by the corporation during the life of the testator who established the trust, does not apply to the disposition of a dividend based on corporate profits earned after the trust had come into existence.

*Miller v. Safe Dep. & Tr. Co.* p. 614

3. A stock dividend from earnings, accrued and declared after the trust has become operative, is payable to the life tenant as income.

*Miller v. Safe Dep. & Tr. Co.* p. 616

4. These principles do not apply to a stock dividend derived from earnings wholly realized after the testator's death.

*Miller v. Safe Dep. & Tr. Co.* p. 615

5. Such a dividend could not have passed under the testator's ownership, so as to have become an integral part of his assets, but has the essential and distinctive character of income from the trust estate so invested.

*Miller v. Safe Dep. & Tr. Co.* p. 615

6. It acquires that character from the time and circumstances of its origin, and not from the terms of the trust under which it is applied to its intended object.

*Miller v. Safe Dep. & Tr. Co.* p. 616

7. Though it may be directed to be appropriated to corpus purposes, it is received as income by the trustees.

*Miller v. Safe Dep. & Tr. Co.* p. 616

8. An income dividend is payable to the person entitled at the time it was declared.

*Miller v. Safe Dep. & Tr. Co.* p. 615

9. Where a testator, creating a trust, declares, in effect, that the whole income from the estate, no matter how or when derived, which accrues after a certain date, is to be given to the life tenants, an inquiry as to the original source of an income dividend is unnecessary.

*Miller v. Safe Dep. & Tr. Co.* pp. 615-616

STREET PAVING. See TAXATION, 2.

STREET RAILWAY COMPANIES.

**1. Speed: city and country.**

The duty as to the operation of electric cars in cities and over cross streets has no application to operating cars in the open country, where it is known that the cars are permitted to be run at much higher speed.

*Westerman v. United Railways Co.* p. 231

**2. Stops at crossings.**

No rule of law requires a street railway company to stop its cars at all points upon signal to take on passengers.

*Westerman v. United Railways Co.* p. 231

SUICIDE.

**Motive: financial difficulties.**

In such cases evidence of financial difficulty and irregularity in the affairs of the decedent are admissible, as bearing upon the question of motive.

*Rosman v. Travellers Ins. Co. of Hartford.* pp. 694-695

TAXATION.

**1. Railway mortgages.**

The statutes relating to the taxation of mortgages have no application to mortgages executed by a railroad company to a trustee to secure bonds sold to investors.

*State v. Baltimore & Ohio R. R. Co.* p. 438

**2. Special assessment: street paving.**

Every special assessment for public improvements, where there are no special benefits conferred, is wrong, and if consummated is nothing more than the confiscation of private property for public use without compensation.

*United Rwy. Co. v. Baltimore City.* pp. 670-671

**3. Reassessment: notice.**

Notice and an opportunity to be heard are essential to the validity of every assessment for the purposes of taxation.

*Havre de Grace v. Lewis.* p. 372

TAXICABS. See AGENCY.

TAX SALES.

**Notice: to owner.**

The provisions of section 230 of Article 2 of the Public Local Laws, relating to the levy upon property to be sold for failure

TAX SALES—*Continued.*

to pay taxes, are not complied with by delivery of the notice of the levy upon anyone other than the owner of the property.

*Abromatis v. Amos.* pp. 398-399

## TELEGRAPH COMPANIES.

## 1. Mistakes: damages.

In general, where an offer for the sale of goods at a certain price is made by telegraph, and, by the mistake of the Telegraph Company in transmitting the message, a lower price is quoted than was intended, the measure of damages, if the goods, at such a lower price, were accepted by the vendee, and obliged to be delivered by the vendor, is the difference between the price named in the telegram, as delivered for transmission, and the price which the seller by the exercise of reasonable prudence and diligence could have obtained for the goods, and not the difference between the price as it was quoted to the Telegraph Company for transmission and the price as actually conveyed to the addressee through the Telegraph Company's mistake.

*Western Un. Telegraph Co. v. Bloede.* p. 357

2. The difference between the prices named by the vendor, as he sent it for transmission, and the lower price telegraphed through error by the Telegraph Company, may be accepted as *evidence* of the damages actually sustained, in case the goods were delivered to the addressee before the sender discovers the mistake, if the sender could not reduce his loss by disposing of the goods in any other manner.

*Western Un. Telegraph Co. v. Bloede.* p. 357

3. Where a manufacturer, without any fault of his own, but by the error of the Telegraph Company through which he transmits his message, is made to make an offer to furnish goods at a figure lower than he intended, and the offer is accepted, and the manufacture of the goods is begun before the mistake is discovered, then if the manufacture of the goods is such that it must be a "continuous process," to stop the manufacture of which before the completion of the order, would cause a loss greater than would have been occasioned by a sale at the mistaken price quoted, the mere knowledge of the manufacturer, of the existence of the mistake, before the delivery of the goods, will not limit his right of recovery, against the Telegraph Company, to the mere cost of transmitting the message.

*Western Un. Telegraph Co. v. Bloede.* p. 354

THOUGHTS. See EVIDENCE, 13.

TIME. See CONTRACTS.

TRUSTS: ACCEPTANCE OF—.

1. —; effect of—.

Where an aunt and the father united in a voluntary gift to the daughter, and had stock placed in the daughter's name, the income to be paid to the daughter but the stock delivered to the father, as trustee, to be held by him until his death, to all of which terms the daughter consented, there is no legal or equitable principle that enables the donee to abrogate the terms and limitations of the gift and receive the immediate delivery of the stock.

*Calwell v. Rogers.* p. 294

2. One who accepts a voluntary benefaction, with the understanding and agreement that it shall be subject to the terms of a trust expressly declared and approved, can not be permitted to deny the efficacy of the trust, or to defeat the purpose for which the limitations were imposed. *Calwell v. Rogers.* p. 294

TRUST FUNDS. See ENACTMENT.

TRUSTS AND TRUSTEES. See CORPUS OR INCOME.

1. Equity not to allow to fail.

Equity will never allow a trust to fail for lack of a trustee.

*Stein v. Safe Dep. & Tr. Co.* p. 213

2. No power to change terms of trust.

Trustees have no power to alter the nature and object of the deed or will appointing them, or under which they derive their powers, nor to dispense with the exact performance of the conditions imposed upon them.

*Stein v. Safe Dep. & Tr. Co.* p. 215

3. Nor does any such power reside in a court of chancery.

*Stein v. Safe Dep. & Tr. Co.* p. 215

4. Powers: when personal.

Where power is given to an executor or trustee by reason of special confidence in the individual, or to be exercised only upon their personal judgment or discretion, no such power will pass to a substituted trustee.

*Stein v. Safe Dep. & Tr. Co.* p. 214

5. Powers of substituted trustee.

By his will, M. S. left his estate to his wife and certain other trustees in trust, with certain broad and discretionary powers,

# TRUSTS AND TRUSTEES—*Continued.*

and further provided that upon the *death* of his wife, the other trustees were to assign and convey the trust estate to the Safe Deposit and Trust Company, for the purposes of the trust; it was also provided that in the event of the estate *passing into the hands* of the said Trust Company, the discretionary powers theretofore given to the trustees should be exercised by the President of the Trust Company alone: *Held*, that upon the *resignation* of the wife (the other trustee having died or refused to act), the property was to be conveyed to the Trust Company, and the discretionary powers referred to were to be exercised by its President, in the same manner as would have been the case upon the wife's death. *Stein v. Safe Dep. & Tr. Co.* p. 214

## 6. Successor appointed by creator of trust.

The creator of a trust has full power to provide for the appointment of a successor or successors in the trust, in case the original trustee refuses to act, dies or is removed.

*Stein v. Safe Dep. & Tr. Co.* p. 212

7. If the substitution of a new trustee is provided for in the will, either by naming the person to be substituted trustee, or by giving the power of appointment to another person, the substituted trustee, named in accordance to such provisions, takes under the will and derives the power to act from the testator.

*Stein v. Safe Dep. & Tr. Co.* p. 212

8. The discharge of the duties of a trustee with relation to the trust may be performed by such substituted trustee, even though such substitution was made at a different and earlier time from that which the testator or creator of the trust contemplated.

*Stein v. Safe Dep. & Tr. Co.* p. 213

## 9. —; acceleration of appointment.

The acceleration of legacies under certain conditions has long received judicial sanction. The same principle may be applied to the administration of a trust.

*Stein v. Safe Dep. & Tr. Co.* p. 213

## 10. Surviving trustees: powers of—.

In general, and unless the intention of the testator appears clearly to be otherwise, where any of several trustees disclaim, the remaining trustees or trustee will not only take the entire legal estate, but also all the powers and authorities vested in the trustees as such, and which are requisite for the administration of the trust.

*Stein v. Safe Dep. & Tr. Co.* pp. 213, 214

**TRUSTS AND TRUSTEES**—*Continued.***11. Time of payment absolutely left to discretion of trustee: whole fund or part only.**

Where a provision in a will leaving property in trust declared that in the discretion of the trustees, the portion of one of the *cestuis que trustent* should, under certain conditions be paid to him absolutely, it applies to the whole of such child's portion, and not to any part less than the whole.

*Stein v. Safe Dep. & Tr. Co.* pp. 216-217

**VERDICTS.****Criminal law.**

In criminal trials, the form of the jury's verdict may be "Guilty" merely, or "Guilty on" one or more counts, specifying which ones; or "Not Guilty" merely, or "Not Guilty on" one or more counts, in conjunction with the finding of guilty on others.

*Simond v. State.* p. 40

**VEHICLES.** See **DRIVERS OF**—.**VENDOR'S LIEN.****Recital in deed no waiver.**

A vendor's lien, and the right to enforce it, where the consideration for the deed has not been paid, is not waived or lost by the mere recital in the deed that the consideration has been paid.

*Schneider v. Martens.* p. 553

**VOLUNTARY APPEARANCE.**

The voluntary appearance of a party to a suit or proceeding must be considered as a waiver of formal notice.

*Abromatis v. Amos.* p. 403

**UNIFORM SALES.** See **SALE OF GOODS.****WARRANTY.** See **SALE OF GOODS.****WIDOWS.** See **DESCENT AND DISTRIBUTION.****WILLS: CONSTRUCTION OF**—.**1. Classes of persons: time of ascertainment.**

In general, in cases of a devise to a class, the members of the class are to be ascertained upon the death of the testator, since a will usually speaks from that day. *Dawson v. Akers.* p. 589

**2. —; "all the children of."**

By his will, a testator bequeathed property in trust "for the use and benefit of all the children of" her brother H.; the duration of the trust was declared to be for the time "when there shall be no child of my said brother living and under 21 years

# WILLS: CONSTRUCTION OF—*Continued.*

of age," at which time it was declared the trust should cease, and distribution be made, in accordance with the terms of the will:

*Held*, that this constituted a gift to a class of persons, and that the mere use of the word "all" preceding the word "children" did not change the legal effect of the rule applicable to such gifts.

*Dawson v. Akers.* p. 589

## 3. Time of distribution.

But where the distribution is, by the terms of the will, deferred to some time after the testator's death, the gift will embrace, not only all the children or members of the class living at the death of the testator, but all those who may subsequently come into existence, and are living at the time designated for the distribution.

*Dawson v. Akers.* pp. 589-590

4. In this case it was: *Held*, that the trust had ended and that a distribution of the property should be made by the trustee to the beneficiaries free and discharged of the trust.

*Dawson v. Aker.* p. 592

## 5. Husband: not next of kin or heir.

In general, an ultimate limitation in favor of next of kin or of heirs at law, does not include a husband, unless there be some manifestation of an intention on the part of the testator to include him.

*Safe Dep. & Tr. Co. v. Carey.* p. 597

6. Where a testatrix, by her will, left her property to her husband during his life, and upon his death to her daughter (and only child), absolutely, if living at the time of the testator's death, and in case the daughter should die before the testatrix's husband, then to the daughter's children or descendants, *per stirpes* and not *per capita*, and in default of any children or descendants, then to the daughter's next of kin: *Held*, that by the correct interpretation of the will, the property was left to the husband for his life, and after his death, to the next of kin of the daughter, *in esse* at the time of the death of the life tenant, in case she did not survive him.

*Safe Dep. & Tr. Co. v. Carey.* p. 597

## 7. Intent: general and particular.

In the construction of wills, if there be apparent a general and a particular intent, the general intent, although first expressed, controls and overrules the particular intent, if there is any conflict between them.

*Higgins v. Safe Dep. & Tr. Co.* p. 175

WILLS: CONSTRUCTION OF—*Continued.***8. Intention: surrounding circumstances.**

What a testator meant to say must be gathered from what he did say in his will, as viewed from the standpoint he then occupied; and what the testator says in his will, considered in the light of established legal principles, must govern the interpretation of the will.

*Dawson v. Akers.* pp. 588-589

**9. Fee simple estates, or defeasible fees.**

A testator, after some personal bequests, left the third of the residue and remainder of his estate to his wife, and then provided:

"Second, the other two-thirds of my estate I give, devise and bequeath unto my four following named children, Edward V., Eleanor C., Mamie J. Duering, and Emma C. Brill, equally, share and share alike, absolutely, and forever, with full power to dispose of either by sale, or in any manner whatsoever, they or any of them may see fit or proper \* \* \*"

"Third, in case of the death of either of my aforesaid children, then his, her, or their share or shares so as above devised and bequeathed, shall go to the child or children then living of the one so dying. But in case he, she, or they die without leaving any such child or children surviving, then the share of the one so dying shall go to my surviving children, share and share alike."

In construing this will, it was: *Held*, that its third provision was not intended to, and did not, have the effect of cutting down to life estates, or defeasible fees, the shares given absolutely by the second provision of the will.

*Duering v. Brill.* pp. 111-112

**10.** This third clause was intended only to provide alternative beneficiaries for the shares of any child or children, who might predecease the testator, without leaving issue.

*Duering v. Brill.* pp. 111-112

**11.** What is said in the construction of one will is but seldom conclusive in the consideration of another.

*Duering v. Brill.* p. 110

**12.** In construing wills, the general intent of the testator must prevail over a particular intent.

*Hilgartner v. Hilgartner.* p. 273

**13. Interpretation: intent.**

The directions of a testator, when plain, unambiguous and in

**WILLS: CONSTRUCTION OF—Continued.**

violation of no established principle of law, must of necessity prevail.

*Stein v. Safe Dep. & Tr. Co.* p. 217

**14. —; from words used.**

In interpreting wills, the question of intent is to be sought from the language used by the testator; it is not a question of what the testator may have meant, but simply what is the meaning of the words he used.

*Stein v. Safe Dep. & Tr. Co.* p. 215

**15. Testator's rights.**

A testator may make division of his estate among his legatees equally or unequally, as he may see fit.

*Higgins v. Safe Dep. & Tr. Co.* p. 177

**16. —; division among relatives.**

As between individuals in the same degree of relationship, equality would mean equality of sharing, or of participation.

*Higgins v. Safe Dep. & Tr. Co.* p. 177

**17.** The mere fact that a testator, in dividing the remainder of his estate among certain legatees, adds an "s" to the last name of each, is not an indication that the division was to be made by families.

*Higgins v. Safe Dep. & Tr. Co.* p. 177

**18.** In the construction of wills, if there be apparent a general and a particular intent, the general intent, although first expressed, controls and overrules the particular intent, if there is any conflict between them.

*Higgins v. Safe Dep. & Tr. Co.* p. 175

**19. —; general and particular.**

A clearly expressed intention in one portion of a will is not to yield to a doubtful construction in any other portion.

*Higgins v. Safe Dep. & Tr. Co.* p. 175

**20. Option to purchase part of estate.**

A testator's estate consisted mainly of the capital stock of the corporation, under the name of which he and a brother had been carrying on a profitable business; the will, after making careful provisions for the division of his estate between his wife and children, and the survivors, etc., and, to his executors the power to sell, reinvest, etc., gave to a brother an option to purchase the testator's stock in said corporation at its book-value, according to the last annual statement: *Held*, in view of all the facts of the case, the option was intended to be one to be exercised in a reasonable time, and that a reasonable time would be within a year from the grant of letters on the decedent's estate.

*Hilgartner v. Hilgartner.* p. 275

**21. Technical expressions, and intent.**

In construing wills, if the court is satisfied that the technical rules, which have been applied to particular expressions, will not carry out, but defeat, the intention of the testator, the rules must yield to such intention, and such construction given as will effectuate that intent (provided it violates no established principle or policy of law). *Higgins v. Safe Dep. & Tr. Co.* p. 175

**WITNESSES.****1. Answers: partly admissible.**

Where part of the answer of a witness is admissible, it is error to strike out the whole answer. *Marx v. Marx.* p. 387

**2. Competency of—.**

The statute, section 3 of Article 35 of the Code, excluding the evidence of one party to a transaction, when the other party is dead, was passed to prevent injustice being done, and not to cause it. *Cacy v. Slay.* p. 501

**3. Examination: discretion of lower court; answer not given in record.**

The ruling of the lower court upon the propriety of a question it was proposed to ask a witness, is not open to review on appeal, when the question does not appear from the record to have been answered. *Bavington v. Robinson.* p. 49

**4. Re-examination.**

On the re-examination of a witness in rebuttal, it is within the discretion of the trial court, whether or not a subject upon which he had been examined in chief should be reopened.

*Bavington v. Robinson.* p. 50

**WORKMEN'S COMPENSATION ACT.****1. Commission's decision: presumptions favor—; appeals.**

Chapter 800 of the Acts of 1914—the Workmen's Compensation Act—provides that the decision of the Commission shall be treated on appeal as *prima facie* correct, and that the burden of proof shall be on the party attacking it.

*Frazier v. Leas.* p. 577

**2. An appeal from a judgment of the Commission to the courts presents for determination questions of law and facts.**

*Frazier v. Leas.* p. 576

**3. —; new evidence.**

No provision of the Act attempts to confine or limit the appeal to the testimony taken before the Commission.

*Frazier v. Leas.* p. 576

**WORKMEN'S COMPENSATION ACT—Continued.**

4. The Act secures to the party appealing the right to a trial by jury, and the right to have any question of fact involved in the case submitted to the jury. *Frazier v. Leas.* p. 577

5. And on such an appeal the party attacking the decision of the commission may, under the statute, introduce any proper oral evidence. *Frazier v. Leas.* p. 577

**6. Appeals to court: insurance carrier.**

The words of section 56 of Article 101 of the Code, giving the right to hear appeals from the decisions of the Commission, to the circuit courts, or law courts of Baltimore City, having jurisdiction over the place where the accident occurred, or over the person appealing from such decision, includes the insurance carrier, as a party interested, to whom the right of appeal is given.

*Brenner v. Brenner.* p. 193

**7. —; court of county where insurance was obtained.**

For the purpose of an appeal from the finding of the Commission, the insurance carrier can only address itself to the Court having jurisdiction in the county where the insurance was solicited and obtained. *Brenner v. Brenner.* p. 194

8. The mere fact that the main office of the insurance carrier is located in a distant county does not vest the court of that county with concurrent jurisdiction to entertain such an appeal.

*Brenner v. Brenner.* p. 194

**9. Insurance company a surety.**

The insurance company, insuring against the claims of employees, according to the terms of the law, occupies the position of surety for the employer. *Brenner v. Brenner.* p. 194

**10. Object.**

The object and purpose of Ch. 800 of the Acts of 1914—the Employers' Liability Act, sec. 56 of Art. 101, Bagby's Code, Vol. III—was to provide a speedy and inexpensive method by which, in the case of injuries to employees, compensation might be made to them, or to those depending upon them, without delay of long litigation and at a minimum of cost; and to substitute a more nearly uniform scale of compensation in such cases than is attainable from the divergent estimates of juries, and to avoid the application of certain well established rules of law, which in some cases have seemed harsh in their operation.

*Brenner v. Brenner.* p. 192

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